In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,

Petitioner,

VS.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Deposit Guaranty National Bank of Jackson, Mississippi (real party in interest), prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision entered August 24, 1978, reversing the District Court's order denying a Rule 23(b)(3) class action status in a suit asserting liability for the penalties of usury in favor of a "class" of 90,000 credit card customers of the defendant bank.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. (Apx. A) The opinion of the Court of Appeals for the Fifth Circuit is reported at 578 F.2d 1106. (Apx. F) Both are appended. Also included is the Judgment of the District Court dismissing the Complaint on payment of the amount demanded. (Apx. B)

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Court of Appeals entered its decision on August 24, 1978 (Apx. F), and denied re-hearing on October 20, 1978. (Apx. G)

QUESTIONS PRESENTED

[Mootness Questions]

I.

For jurisdictional purposes, does a Complaint seeking damages (penalties of usury), when coupled with a class action request, survive the death of the controversy between the named parties before the Court, when the death is occasioned by an effective tender to the named plaintiff of his total damage *after* the District Court, on a full record, has been afforded the opportunity to certify the class but has entered an order declining to certify the suit for class action status?

II.

Does a case in which Rule 23(b)(3) class action status is requested, but denied by the District Court, become moot when the nominal plaintiff is paid in full, after such denial, and no longer maintains a personal interest stake in the outcome of the litigation?

[State Law and Policy Questions]

III.

May the Rule 23(b)(3) procedural device be used to override the substantive law and policy of the forum state on issues which depend for resolution on state statutes?

IV.

To narrow the question further, is the trial court obliged to use the class action procedural device to aggregate usury claims to impose mass penalties against a lender, when the announced substantive law and policy of the state proscribes such an aggregation of claims as unfair to and as a legal fraud upon the lender and when state case law prohibits the use of its usury statutes to such an end—especially where, as here, usury, in terms of liability, vel non, is unknown to federal law, except for violations of state statutes?

[National Bank Questions]

V.

Is the Fifth Circuit correct in holding that national banks are subject to procedural Rule 23(b)(3) in a manner which excludes consideration of state law and policy, when other federal litigants, including state banks, are not so exposed?

[Standard of Review Questions]

VI.

When an experienced District Court Judge considers a full record on the class action issue and demonstrates full awareness of all of the fixed standards by which class action requests under Rule 23(b)(3) are to be resolved, and in the light thereof, exercises a considered discretion, is the decision to deny certification subject to reversal merely because the appeal court panel believes that the case is appropriate for class treatment and would have made a different choice and, therefore, concludes that the trial judge exceeded the "bounds" of his "discretion"?

VII.

Is a District Court *bound* to certify a Rule 23(b)(3) class action when "management" of the case as a class action presents problems which are formidable but not necessarily insuperable? Is the District Court allowed to consider and give effect to the known public policy of the forum state when considering whether the class action is superior for the "fair" adjudication of the controversy?

STATEMENT OF THE CASE

Two individual credit card holders appeared as the named plaintiffs in an action filed in the Mississippi District Court. The plaintiffs alleged violation of the Mississippi statutes on usury and sought to recover for violation of these state statutes to the degree allowed by the National Banking Act. (12 U.S.C., §85-86) The Complaint claimed that it was in behalf of the plaintiffs and 90,000 other credit card holders, and a class certification was requested by Motion. The Complaint, as amended, includes a four-year period prior to the revision of the state's interest statutes in 1974. (Apx. L)

A massive record was developed on the "class action" issue. Acting upon this and in the light of several conferences with the Court, an order was finally entered denying class action status. The 22 page opinion of the District Court is found in the Appendix. (Apx. A)

The District Court found, in sum, (1) that the plaintiffs could not fairly and adequately represent the class because they were neither willing nor able to finance the case as a class action; (2) by pragmatic standards, the case was unmanageable as a class action; (3) that a class action was not superior to other available methods for the fair

and efficient adjudication of the controversy, especially in view of (a) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (b) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender; (c) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Bank Act; (d) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys, and (e) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

Over nine months later, the defendant, weary of the litigation, tendered to the named plaintiffs all that they demanded, plus legal interest and court costs. No one else having sought to intervene and assert claims, the District Court accepted this tender, over the *lawyers'* objection, as an appropriate disposition of the case, and ordered that the Complaint be dismissed. (Apx. B) The money was paid into Court. (Apx. C) The plaintiffs thereby received all that they demanded and all that they could recover in their suit.

No contention has ever been made that the nominal plaintiffs did not receive everything demanded by them in the Complaint which used their names, and no appeal was noticed in their behalf. Their attorneys filed a notice of appeal in plaintiffs' names but only purportedly "on behalf of all others similarly situated". (Apx. D) However, not one potential member of the unnamed and uncertified class had sought to intervene or to join in the attempted appeal.

The bank moved for dismissal of the appeal on the ground that the case was moot. (Apx. E) The Fifth Circuit overruled the motion and proceeded to reverse the orders of the District Court to direct certification of a class. (Apx. F) To summarize the holding:

On the mootness question, the Court held that by the very act of filing a class action, the nominal plaintiffs acquired a legal status which precluded them from taking satisfaction and were not only permitted but were duty-bound to appeal a denial of certification, unless excused by the Court. Despite the plaintiffs' complete loss of all personal financial interest in the case, the court held, nevertheless, that "the individual plaintiffs would maintain a stake in procuring class-wide relief", because, it was said, they maintained a "nexus" with the "class" despite the mootness of their own claims, and that a "case or controversy" persisted. (Slip Op., pp. 6570-6571, Apx. F)

On the question of the application of Mississippi substantive law and public policy, the Court acknowledged that usury claims are penal in Mississippi and are viewed as personal to the borrower and that "the aggregation of such claims is condemned", but then put this aside on the view that a national bank is controlled in matters of procedure by the Federal Rules of Civil Procedure; hence, the Court said, the state law with respect to aggregating usury claims is inapposite and would yield to Rule 23, F.R.C.P.

On the matter of the standard of review, the Court held that "a class action is not only superior to other methods, but singularly appropriate for the adjudication of this controversy", and therefore that the District Court went beyond the bounds of its discretion in denying certification.

SUMMARY OF REASONS FOR GRANTING WRIT

The case involves important questions of general widespread interest, regarding the interpretation and application of the class action Rule 23(b)(3).

Writing for the Second Circuit[1] in 1973, Judge Medina lamented that "Class actions have sprouted and multiplied like the leaves on the green bay tree" In the same opinion, much of the blame was placed on the adoption of "the erroneous and frustrating view that some way *must* be found to make the case viable as a class action". Since 1973, class actions have continued to sprout and multiply. Annotations to the rule in the United States Code cover over 500 pages.

The Fifth Circuit has embraced the "must" philosophy, viewed by other courts as being erroneous and frustrating, and in so doing, has extended the reach of the Rule 23(b)(3) procedural device into new and controversial areas.

The law on this score is in a state of flux and uncertainty. The decision of the Fifth Circuit raises important federal questions which arise from:

(a) The use of a vague "nexus" test to determine mootness in the place of the "personal interest stake" test announced by this Court;

(b) The conference of litigant status upon an uncertified putative class, despite trial court denial of class action status, in order to retain jurisdiction under the requirement for existence of a live case or controversy;

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1. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA 2, 1973), affirmed, 417 U.S. 156, 94 S.Ct. 2140 (1974).

(c) The fixing of a duty upon a nominal plaintiff to reject satisfaction of his own claim, when tendered after an adverse ruling on the certification claim, and the duty to appeal an order denying class action status unless excused by the court,—thereby forcing a merits trial and appeal in all cases filed as class action attempts, whether certified for class status or not;

(d) The use of a procedural rule to override articulated state substantive law and public policy which proscribes the aggregation of usury claims under its statutes as unfair to and a legal fraud upon the lender;

(e) The discrimination against national banks, where such banks are singled out for exposure to the legal fraud of aggregation while state banks and other lenders with state charters are free of such exposure, contrary to the "most favored lender" status contemplated by the National Bank Act.

The mootness decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeal and, in principle, with its own prior decision. It also adopts and implements a test for mootness which is at variance with and in contradiction of decisions of this Court.

The use of the procedural rule to override substantive law collides with the enabling act under which the rules were adopted and is a misapplication of federal supremacy to encroach unnecessarily upon the public policy of the state from whose statutes liability, vel non, must be derived.

The decision which asserts that the District Court exceeded the bounds of its discretion is a drastic departure from established standards of review governing discretionary trial court determinations and is contrary to the decisions of other Courts of Appeal and a departure from the Fifth Circuit precedents as well.

ARGUMENT

POINT I.

The Case Is Moot

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1969); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1962); *State of California* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (Apx. B) This terminated the controversy between the named parties before the Court.

The mootness issue turns upon the question of whether jurisdiction survived death of the controversy between the defendant and the named plaintiffs. The Fifth Circuit found that it did survive for three reasons: (1) the nominal plaintiffs could not terminate their "duty" to represent the class by taking satisfaction; (2) the defendant could not force satisfaction by tender of the amount demanded; and (3) the trial court erred in declining to certify a class. The Court also held that the nominal plaintiffs suffered a "duty" to appeal, unless excused by the Court.

The Fifth Circuit's approach is interesting but novel. A Court of Appeals generally takes a case for review as it arrives at the appellate level. Jurisdiction to review for error requires the existence of a live controversy at the time the court is called upon to adjudicate upon any assignment of error. When, therefore, the case is dead on arrival, and the death sentence is executed by means of an order which is alleged to be not *void* but *erroneous* only, then the jurisdiction to adjudicate and declare it so is simply lacking.

The exercise of jurisdiction to revive a case dead on arrival, as here, is without precedential support. It conflicts with the decisions of other circuits, and, most importantly, conflicts with a series of class action "mootness" decisions of this Court.

[Conflict With Other Circuits]

The Seventh Circuit, in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1970), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), was presented with essentially the identical situation on a class action complaint seeking damages for violations of the Securities Exchange Act. After entry of an order declining to certify the case as a class action, a tender was made and the case was dismissed by order over the plaintiffs' objection. On appeal, plaintiffs sought review of the order declining certification. The Court held that the case was moot and it lacked review jurisdiction. After reviewing recent cases from the Supreme Court, the Seventh Circuit held:

> "When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action." (560 F.2d at 277)

Because of mootness, several other circuits have rejected appeals from denials of class certification in the face of settlements or satisfaction of the claims of the named plaintiffs. For example, see *Napier* v. *Gertrude*, 542 F.2d 825 (CA 10, 1976) (release of plaintiff from custody); *Vun Cannon* v. *Breed*, 565 F.2d 1096 (CA 9, 1975) (release from custody); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (CA 2, 1976) (demand by indigent for assignment of counsel in divorce case was met).

In *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), the Fifth Circuit affirmed an order dismissing a class action complaint for mootness based upon an order approving a compromise settlement between the defendant and nominal plaintiffs, despite non-involvement of the "class" and the vigorous objections from a potential class member who sought to intervene. The *Pearson* court recognized the effect of a *denial* of certification as effective to strip the case of all class action characteristics[2] and to open the way for disposition of the case by a settlement which excluded the uncertified class, and the Court expressly declined to review the class denial for possible error. This case was cited in the Roper opinion but the obvious conflict was not acknowledged.

[A Distinction in Point]

Some courts have drawn a distinction between cases where the claim of the named plaintiffs is satisfied after denial of certification and those where satisfaction is tendered during pendency of a motion for certification and

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2. See also Advisory Committee's Notes to Rule 23, cited in the opinion.

prior to a ruling thereon. These cases hold that in the first mentioned cases, jurisdiction is lost by mootness but not in the last mentioned cases.

While the view which postpones mootness to allow for a ruling on a prior motion for certification finds no support in decisions of the Supreme Court and is not relevant here on the facts of the instant case, it is mentioned for comparative purposes and to note that there is also a conflict of authority on this approach as well.

Notable for this distinction is the ruling of the Seventh Circuit in the very recent case of *Susman* v. *Lincoln American Corp.*, ... F.2d ..... (CA 7, Oct. 14, 1978), No. 78-1293:

> "We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. . . ."

The *Susman* case distinguishes *Winokur* v. *Bell Federal Savings and Loan,* supra, on the factual basis that *Winokur* involved a tender after denial and *Susman* involved a tender while the motion was pending and before the trial judge could rule on the motion.[3]

The Fifth Circuit recognized the same distinction in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), but disregarded it in the case at bar, when holding that the case did not become moot in either event, if the Court of Appeals chose to find error in the denial.

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3. The Susman Court acknowledged a conflict, saying:

"We acknowledge the conflict between this decision and that of the Eighth Circuit in Bradley v. Housing Authority of Kansas City, Missouri, 512 F.2d 626 (8th Cir. 1975) . . ."

[Conflict With Supreme Court]

Several cases from this Court bear directly on the mootness question. Most of these cases were relied upon by those circuits whose decisions conflict with the Fifth Circuit. The Fifth Circuit, on the other hand, completely ignores this series of cases.

Since Rule 23 is a rule of procedure only, it cannot serve to enlarge the jurisdiction of federal courts. See *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941). Article III of the Constitution limits jurisdiction to "cases and controversies". A live controversy must appear at each and every stage of the proceedings, including appellate stages. *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975). The same rules apply in class action attempts as in other cases,—with very carefully limited exceptions. (Cases cited, infra) Cases in point include the following:

In *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975), the plaintiff sought to invalidate a statute of Iowa requiring a residence of one year's duration as a condition to maintaining a suit for divorce. The plaintiff sought to represent a class of persons similarly situated. A three-judge court first certified the class. It then upheld the statute. Pending appeal, the plaintiff satisfied the durational requirement by the mere passage of time and her own case became moot. Based upon the "important consequences" of a formal certification, it was held that the case was not moot for lack of an actual "case or controversy" because:

> ". . . When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . ." (95 S.Ct. at 557)

See also: *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), in which the class was precedently certified as in *Sosna*, supra.

In *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975), a group of school students who were involved in the publication of a student newspaper filed suit alleging that the school board unconstitutionally issued rules which interfered with the publication. The action was filed as a class suit. It was never certified. On appeal, it was determined that the named plaintiffs had graduated. It was held that the graduation caused the case to become moot as to the named plaintiffs and in the absence of due certification by the trial court, the case was completely moot and beyond consideration on appeal for want of jurisdiction. The Court held:

> ". . . Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (95 S.Ct. 850)

In *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975), the plaintiff in custody sought by a class action complaint to force the North Carolina parole board to accord him certain procedural rights in considering his eligibility for parole. The District Court declined to certify the class. It dismissed the complaint. Pending review by the Supreme Court, the plaintiff was paroled and released from supervision.

The Court held that since the named plaintiff ceased to have a personal interest and the requested class had not

been certified, the case was moot. Applying and clarifying the *Sosna* dicta, the Court concluded:

> "Sosna decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element. . . ." (96 S.Ct. at 349)

Baxter v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976), was a class action challenge to prison disciplinary proceedings on constitutional grounds. The District Court was said to have treated the suit as a class action but without formal certification. The Court said:

> ". . . Without such certification and identification of the class, the action is not properly a class action. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). . . ." (96 S.Ct. at 1554)

In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976), the Court again emphasized that absent a formal certification of a class, the case is moot when the named plaintiff no longer has a personal stake in the case, and that this is so despite the fact that the parties informally treated it as a class action and its potential members continued to have an interest in the outcome.

Finally in *Kremens* v. *Bartley*, 97 S.Ct. 1709 (1977), the Court cautioned:

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Com'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise.

In *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 S.Ct. 448 (1920), the Court said:

> ". . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ." (40 S.Ct. at 449)

In *State of California* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893), the Court held that an action was mooted by tender of all sums which could be recovered, despite the refusal of the plaintiff to accept the tender.

To summarize, this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

In this case, there was no certification of a class and the alleged statutory violation is not one shown to be

"capable of repetition, yet evading review", especially since Mississippi amended its interest statutes in 1974 to approve the service rates charged by bank credit cards (Apx. L) and the named plaintiffs do not claim that they continue even to hold a bank credit card.

Although the above cited decisions of this Court have a direct bearing upon the mootness question, all were ignored by the Fifth Circuit without so much as a single citation. Instead, the Fifth Circuit prefaced its discussion with the surprising statement that:

> "The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. . . ."

In this shift of dispositive emphasis from the *fact* of mootness to a *cause* of it (settlement or satisfaction), lies the fundamental error by which confusion is born and by which Rule 23 is mistakenly allowed to enlarge federal jurisdiction.

Settlements, whether by compromise or simple satisfaction, have always been highly favored in the law.[4] Without question, the amount paid fully satisfied the financial demands of the named plaintiffs and they retained no financial stake in the case. The defendant did nothing wrong. It did no more than exercise a traditional legal right to buy peace. Moreover, this occurred only after the District Court had denied certification on a full record,

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4. This principle has been recognized by the Fifth Circuit in previous cases, as to which see *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), a class action wherein it was held that a settlement with the named plaintiffs rendered the case moot, despite objections from potential class members who sought to intervene.

and when the case was stripped of all class action characteristics.

The disposition of the Complaint in this case by the dismissal order harms no one. The payment in satisfaction of the named plaintiffs did not affect the rights of anyone else who might wish to come forward and assert claims in the future. There was no trial or judgment on the merits of the case. There was no res judicata.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the ten months' lapse of time between the denial of class certification and the final order of dismissal (Apx. A and B) afforded ample time.

The lower court finds that the named plaintiffs continued to have a "nexus" with the putative class which they sought to represent. But what this "nexus" consisted of is not clear, because there was no community of interest in the subject matter and all persons were total strangers, having in common only the fact that they all once utilized the bank's credit cards. More importantly, it is not a "nexus" but a "personal interest stake" that is required under the decisions of this court, and in an action purely to recover money penalties, that personal stake has to be financial, because there is nothing else in sight on which to mount a justiciable controversy.

The bottom line is this: If a defendant in a Rule 23(b)(3) attempt is not allowed to settle or buy peace after the District Court has denied certification, whether correctly or incorrectly, then every case involving class action allegations will have to be tried on its merits in

the District Court and reviewed on appeal before an end can be brought to the action.[5] The traditional right to settle or buy peace and end litigation is a right of substance. There is no such compulsion built into procedural Rule 23(b)(3) as to justify the denial of this substantive right to seek repose. A contrary view can prevail only by embracing the erroneous and frustrating view that every complaint filed as a class action seeking money *must* be handled as a class action. This approach does not comport with the rule's intent to enhance the fair and efficient administration of justice.

POINT II.

The Procedural Rule Has Been Used to Adversely Affect Substantive Rights Under the Law

As did the Fifth Circuit, we begin the discussion of this point with the acknowledgement that: (Slip Op., p. 6576, Apx. F)

> ". . . Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned. Fry v. Layton, 1941, 191 Miss. 17, 2 So.2d 561. . . ."

The relevant substantive law and policy of Mississippi is established by a series of three cases from the state's highest court. As held in *Deposit Guaranty Bank & Trust Company* v. *Williams,* 193 Miss. 432, 9 So.2d 638 (1942):

> "Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the

5. This result would flow from the holding of the Fifth Circuit that by the very act of filing a class action complaint, duties are assumed which cannot be terminated by taking satisfaction, including the "duty" to appeal. (Slip Op., p. 6570, Apx. F)

nature of regulations in the public interest." (9 So.2d at 640)

Note that the Court speaks of both rights of action and defenses. Mississippi takes the view that the aggregation of usury claims in the hands of a stranger to the credit transaction is "unjust" to and a "legal fraud" upon the lender. The reason for the policy is not only to keep a stranger from profiting from the transaction of another, but is to protect the lender from the aggregation of penalties,—contrary to the intent of the laws against usury.

In *Fry* v. *Layton,* 191 Miss. 17, 2 So.2d 561 (1941), the Court dealt with an instance where a plaintiff had purchased usury claims and had taken assignments. The Court held that the assigned claims could not be made the subject of an action by the assignee. The Court said:

> " 'The statute . . . was not meant to give to the borrower any unjust advantage of the lender. Its good purpose should not be perverted into a source of legal fraud by borrowers upon lenders. . . .'
>
> "We hold that appellee, as assignee, cannot recover on these claims. . . ." (2 So.2d at 565)

The later case of *Liddell* v. *Litton Systems, Inc.,* 300 So.2d 455 (Miss., 1974), parallels the instant case exactly and applies the *Fry* "legal fraud" decision in a class action attempt. The Court said:

> "The appellant argues, however, that this suit is brought *on behalf of* and *for the benefit of* the thousands of unnamed borrowers who allegedly paid a usurious rate of interest and is distinguished from Fry, supra. We are not impressed with this argument. If the right to invoke the highly penal forfeiture provisions of the usury laws cannot be assigned even by an instrument in writing as was done in Fry, then it logically follows that such right cannot be invoked by a stranger on behalf of a borrower who has no knowledge of the impending litigation and who may or may not appreciate the acts of his would-be benefactor. . . ." (300 So.2d at 457) (Emphasis by the Court)

The panel's footnote 7-8 comment which refers to *Fry* v. *Layton,* supra, and would limit the "legal fraud" condemnation of the Mississippi court to aggregation by purchase and assignment simply overlooks or ignores *Liddell* v. *Litton Systems, Inc.,* supra, which condemns the aggregation in the class representative context.

Therefore, the major premise is that the substantive law and public policy of the state condemns as unjust to and a legal fraud upon the lenders any aggregation of usury claims in the hands of a stranger to the credit transactions,—whether the stranger is an assignee, or a self or court appointed representative of a class.

Despite its recognition of the state's law and policy against aggregation of usury claims, the Fifth Circuit's opinion proceeds to reject this substantive law and policy on all scores. This rejection is upon the dual premise that we deal (1) with a national bank which is controlled in matters of procedure by the Federal Rules of Civil Procedure and (2) with claims "founded on federal statutes".

However, the first assumption begs the question and the second assumption overlooks the extent to which state law has been integrated into the letter and spirit of the National Bank Act.

The relevant sections of the National Bank Act are found in 12 U.S.C., §85 and §86. Thereunder, when max-

imum interest rates are fixed by the laws of the state in which a national bank is located, the national bank may charge and collect interest at the same rates allowed to other state lenders. With one limited exception not pertinent here, when those state established rates are exceeded in violation of state law, usury is committed.

Under no circumstances whatever may a national bank be found guilty of usury so long as its rates are no greater than those allowed to state banks and other lenders. Indeed, national banks are placed upon a parity with the state's "most favored lender" so as to forestall any chance of adverse discrimination. See *Tiffany* v. *The National Bank of the State of Missouri,* 18 Wall. 409, 21 L.Ed. 862 (1873); *Fisher* v. *First National Bank of Omaha,* 548 F.2d 253 (CA 8, 1977).

In *Daggs* v. *Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732 (1899), the Court said:

> ". . . The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. Tiffany v. National Bank, 18 Wall. 409, 21 L.Ed. 862."

See also: *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 21 L.Ed. 862 (1873); *Citizens National Bank* v. *Donnell,* 195 U.S. 369, 24 S.Ct. 49 (1904).

As put in *First National Bank in Mena* v. *Nowlin,* 509 F.2d 872 (CA 8, 1974):

> ". . . . The primary principle of construction of 12 U.S.C. § 85, . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state. Citizens' National Bank v. Donnell, 195 U.S. 369, 374, 24 S.Ct. 49, 49 L.Ed. 238 (1904); Daggs v. Phoenix National Bank, 177 U.S. 549, 555, 20 S.Ct. 732, 44 L.Ed. 82 (1900). . . ." (509 F.2d at 876)

Once given the existence of a rule of substantive law or a public policy affecting substantive rights and the application of that law and policy to the case at hand, then Rule 23(b)(3), being procedural only, may not be used as an overriding vehicle.

The federal Rules of Civil Procedure cannot be used to affect the substantive rights of the parties because the enabling Act, 28 U.S.C., §2072 provides:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Cf. *Snyder* v. *Harris,* 394 U.S. 332, 89 S.Ct. 1052 (1969); also, see *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (CA 2, 1973).

This subject was considered in depth by the District Court, which held that the proscription under state law against the aggregation of usury claims for prosecution by strangers was a rule of substantive law and could not be overridden by procedural Rule 23(b)(3). It was also held that the public policy of the forum state in relation to the limitation upon the enforcement of its own laws was a matter of judicial concern in the determination of whether the Rule 23(b)(3) aggregation was superior for a "fair" adjudication of the controversy. (Apx. A., R. 470, et seq.) Judge Nixon concluded:

> "Since the Mississippi statute law alone determines the matters of both interest and the existence

of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.

"Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the 'fair' adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a 'legal fraud' by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud."

The case law and policy of Mississippi has become a part of its statutes fixing rates and defining usury. When plaintiffs must have recourse to the state's statutes as a basis for determining liability, they must take the statutes with the limitations attached. This principle was announced in *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886), an admiralty case involving a claim for wrongful death which depended upon a Pennsylvania statute containing a one-year limitation. In giving effect to the limitation, the Court concluded:

". . . No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration

of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

See also *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S.Ct. 1464 (1945), a diversity case.

So it is here. A class type aggregation could not be used in the state court because it is against the law on account of unfairness and legal fraud. It should not be used now because of the accident of federal court jurisdiction.

Traditionally, interest rates are locally determined by state law. Usury follows the determination that those laws have been violated and the state prescribes the condition under which recovery may be had for such violations. Therefore, the underlying substantive rule is based on state law.

The adoption of state law to determine rates and usury and to equalize treatment of national banks in all banking areas is in harmony with the Rules of Decision Act, 28 U.S.C., §1652.[6] Under this mandate, state law is applied, even in non-diversity cases, when "the underlying substantive rule involved is based on state law." *C.I.R.* v. *Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967). The "laws of the . . . state" within the Rules of Decision Act include judicial decisions of the state's highest court. *C.I.R.* v. *Bosch*, supra, and cases cited.

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6. 28 U.S.C., §1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

In order to bring the decision of this case in line with the national policy applied to national banks, it is essential that federal and state courts alike refrain from allowing national banks to be less favored when called to account in the critical area of loans and financing.

There is not, or should not be, one law of fairness for state banks and a different law of fairness for national banks. Mississippi courts of concurrent jurisdiction[7] would not permit it. Why should a federal court impose a discrimination where the state court would reject it?

A legal fraud directed against a state bank is just as much a legal fraud when directed against a national bank. If mass aggregation of usury claims with its potential for imposing a horrendous penalty is unjust to and a legal fraud upon a state bank and others, it is equally unjust and impermissible when applied to a national bank, or so it should be, and this is the way it is in Mississippi.

Finally, the opinion below noted that "All the members (of the class) live in one state. . . ." That state is Mississippi. All of the roots of this case are in Mississippi soil. It is no more than just and fitting, therefore, that Mississippi plaintiffs, along with Mississippi based lenders, be governed by the public policy of their home state when there is no federal pre-emption of that policy as it affects substantive rights.

Lastly, the Fifth Circuit seems to hold that a national bank is controlled in matters of procedure by the Federal Rules of Civil Procedure in some special way. This presents another departure from precedent. There is no precedent for applying the rules differently to national banks merely because they are born under federal charter. With

7. State and federal courts have concurrent jurisdiction. See 28 U.S.C., §1348 and §1349.

a few exceptions, not here relevant, the federal court no longer has exclusive jurisdiction over actions involving national banks. 28 U.S.C., §1348 and §1349. Moreover, the holding begs the question at issue. The question is not whether or to what extent the parties are controlled in matters of federal procedure, but, rather, whether rules of procedure are to be allowed to override the substantive law and disregard public policy.

POINT III.

The Standard Used to Review the Case on Appeal Is Erroneous

At the outset, we must face the broad statement in the Fifth Circuit opinion that the trial court "went beyond the bounds allowed for the exercise of its discretion with respect to Rule 23(b)(3) determination". (Slip Op., p. 6572, Apx. F)

In facing this, we realize that because of the lip service paid to the discretionary rule, it is difficult to demonstrate the underlying defect and to project this in the context of a problem of national scope worthy of this court's attention.

However, we proceed in the firm conviction that the Fifth Circuit has demonstrably adopted a standard of review which serves to shift the discretionary decision-making in Rule 23(b)(3) class action attempts from the District Court, where it belongs, to the Court of Appeals.

In general, other circuits have restricted review in this area to the standard of "abuse of discretion" and have formalized the doctrine in terms of an inquiry on review as to whether the trial judge acted upon an adequate record and with an appreciation of the legal standards to

be regarded in the decision-making process, including considerations of a pragmatic nature.[8] For example:

The Tenth Circuit in *Wilcox* v. *Commercial Bank of Kansas City*, 474 F.2d 336 (CA 10, 1972), found that there was no abuse of discretion, this being "the sole question before us". The Court said:

> "In denying class action status it was sufficient for the trial court to determine on an adequate record and for good reasons stated that the procedure was not superior to other procedures irrespective of whether the common issues of fact or law were predominant." (474 F.2d at 345)

In *Clark* v. *Watchie*, 513 F.2d 994 (CA 9, 1975), the Ninth Circuit spoke to the point of discretion so vested in the trial court as follows:

> "If the trial judge has made findings as to the provisions of the Rule and their application to the case, his determination of class status should be considered within his discretion. . . ." (513 F.2d at 1000)

In *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F.2d 295 (CA 2, 1969), the Court dismissed an attempted appeal from an order denying class action status, holding that the order was not final within §1291, in the course of which the Court observed:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation." (410 F.2d at 298)

8. The Fifth Circuit is no stranger to the "abuse of discretion" standard, as to which see: *Shumate & Co.* v. *National Association of Securities Dealers*, 509 F.2d 147 (CA 5, 1975); *United States* v. *Wright Motor Co.*, 536 F.2d 1090 (CA 5, 1976), especially footnote No. 1.

In *Langnes* v. *Green*, 282 U.S. 531, 51 S.Ct. 243 (1931), this Court said:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich, Claimant, v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Rule 23(b)(3) especially lends itself to the exercise of a broad discretion because of the need to consider many variables which have no well defined substance or limits and involves factors to be balanced in order to reach a result which is "superior" in method and "fair" as well as "efficient" in its process, giving due regard to the "difficulties" of management and the fair allocation of judicial time and energies.

Compare *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, (CA 2, 1973), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974), affirming the Second Circuit.

In this case, the trial judge acted upon a full record and with a sharp awareness of all of the elements involved and of the standards by which these were to be balanced and evaluated, as his 22 page opinion clearly demonstrates. (Apx. A)

For example, the trial judge considered the management question and found that the case presented the

formidable management problems described in the opinion. The Fifth Circuit decided that since these problems were not insuperable, the case had to proceed as a class action.

The trial judge considered the law and public policy of the forum state on the question of what was "fair" in the circumstances of the case. The Fifth Circuit removed this consideration from the equation entirely.

Other disagreements, both of fact and opinion, appear as between the findings of the District Court and the conclusions on appeal. This makes it clear that the Fifth Circuit would have made a different "choice", but it also confirms that the "choice" was there to be made in the first place.

There is a need for a uniform and realistic standard of review in Rule 23(b)(3) situations which can effectively command more than lip service on appeal. This is necessary to stop the trend toward a shift of discretion from the trial courts, on whom the management burden rests, to the Court of Appeals.

In urging this Court to speak out on the subject, we realize that there may be varying degrees in the standard in relation to the type of case involved. Some Rule 23 actions are by their nature class actions, such as discrimination and civil rights cases, but a Rule 23(b)(3) aggregation attempt is not by nature a class action, but is just the opposite, and is unknown to the common law. 59 *Am.Jur.* 2d, *Parties*, §51. And in Rule 23(b)(3), there is no command that those whom the law traditionally puts asunder shall be joined together at all cost. The evaluation of the cost in relation to the potential return of benefits should always rest firmly on the discretionary judgment of the trial court whose decision should never be reversed except for arbitrary and unreasoned action.

In sum, the Fifth Circuit has embraced the frustrating but erroneous view that some way *must* be found to handle Rule 23(b)(3) claims as class actions, if the problems of management are not insuperable, and the Court decides for itself on appeal that the case is appropriate for class certification. In so deciding, the discretionary choice vested in the District Court has been effectively shifted to the Court of Appeals.

We urge this Court to enunciate a standard of review which will realistically preserve to the trial courts the right effectively to exercise a sound discretion in relation to Rule 23(b)(3) class action attempts.

CONCLUSION

The Advisory Committee's notes to Rule 23 declare that "a negative determination [of class action status] means that the action should be stripped of its character as a class action".

This negative determination was made by the District Court. Everything which was thereafter done in the case was done upon the assumption that the action was stripped of its character as a class action.

However, under the Fifth Circuit's decision, the mere filing of a complaint, with a request for class certification under Rule 23(b)(3), serves to lock in the case to the point that the litigation cannot be terminated after trial court denial of certification, except by trial and appeal. This awesome result derives from the holding that by the very act of filing, the named plaintiff becomes a class representative who may not take satisfaction and has the continuing duty to appeal from the denial of certification in all cases, unless excused by the Court from so doing.

This "locked in" concept is bound to have a far-reaching effect upon courts and parties alike.

Not only has the Fifth Circuit assumed jurisdiction in a controversy dead on arrival, contrary to several decisions of this Court and other circuits, but, in the process, has given to Rule 23(b)(3) an application not indicated by its terms and far beyond its intent. In so doing, the Court creates non-existent party status and standing; takes over the discretion vested in the District Courts; overrides substantive law; disregards state public policy; sanctions invidious discrimination against national banks, contrary to the intent of the National Bank Act; and discourages settlements between parties before the court and promotes unnecessary litigation in the federal forum.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 4261(N)

ROBERT L. ROPER, ON BEHALF OF HIMSELF, AND ALL OTHERS SIMILARLY SITUATED

Plaintiff

vs.

CONSURVE, INC., D/B/A BANKAMERICARD CENTER, JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE

Defendants

MEMORANDUM OPINION [459-474]

(Filed September 29, 1975)

The original plaintiff, Robert L. Roper, and the intervening plaintiff, Jack E. Hudgins, former customers and "Bankamericard" card holders of the defendant, Deposit Guaranty National Bank of Jackson, Mississippi, brought this suit against the defendants on behalf of themselves and other Bankamericard card holders of the defendants. It was designated as a class action under Rule 23, Federal Rules of Civil Procedure, and although it named both of the above defendants, the real party in interest is Deposit Guaranty National Bank (Bank).

The Complaint sets forth two causes of action, the first of which alleges violations of the sections of the National Banking Act dealing with interest charges and

penalties for exacting usury, 12 U.S.C. §§85 and 86; the second cause of action is based upon alleged violations of the federal Truth-in-Lending Act, 15 U.S.C. §1601, et seq.

The violations of law for which this action was brought were alleged to have been committed by the Bank in the administration of its credit card program known as "Bankamericard", which was inaugurated in 1968 and which developed between 90,000 and 100,000 individual credit card accounts.

Plaintiffs seek to qualify and act as class representatives for all Bankamericard credit card holders whose accounts were active within the four year period covered by the original and supplemental complaints filed herein, or from September 18, 1969 until September 19, 1973. It is conceded by both sides that there were 90,000 or more card holders during this period of time. Furthermore, it is agreed that the defendant Bank is subject to the provisions of the National Bank Act of June 3, 1964, c. 106, 13 Stat 99 (Tit. 12 U.S.C. §1 ff).

This cause is now before the Court on the motion of the plaintiff for an order certifying this as a class action and for designation of a class representative. This Court initially found that neither the plaintiffs' first nor second cause of action could be maintained as a class action under Rule 23 and ordered that the motion to maintain the second cause of action based upon an alleged violation of the Truth-in-Lending Act as a class action be denied but reserved final decision on the class action question as related to the usury issue until the record was fully developed on the question of the over-all manageability of the case as a class action.

The parties have fully utilized all desired discovery, including taking of depositions, and have filed herein addi-

tional affidavits. These have been considered along with the evidence previously submitted, and in addition, the Court and counsel have engaged in several conferences following which both sides have submitted excellent briefs and have orally argued all facets of this matter.

The Court is now called upon to determine whether the conditions of Rule 23 have been met, including whether a class action under the circumstances of this case is superior to other available methods for the fair and efficient adjudication of this controversy which must be resolved by the exercise of an informed and sound discretion within the guidelines of the rule and cases construing it, taking due care in the process to avoid encroaching upon the substantive law of the forum to the extent that it applies to the case sub judice and has not been pre-empted by federal law.

Before proceeding to decide this class action question, the Court notes that the merit issues herein include whether the so-called service charge is subject to Mississippi statutes on usury; what rate of interest is allowable on loans of credit; whether the effective rate actually paid in any given case is to be determined on a daily, monthly or other basis; and whether the rate so determined was exceeded in any given individual case. The Court may not proceed to decide these issues as long as the class action status of this case remains unanswered, because no merits determination of fact or law can be made without due process notice to all identifiable members of the proposed class, if this is determined to be a proper class action. *Eisen* v. *Carlisle & Jacqueline*, 94 S.Ct. 2140, 417 U.S. 156 (1974); *Miller* v. *Mackey International*, 452 F.2d 424 (5th Cir. 1971).

A modern credit card system such as the Bankamericard system is made possible by the utilization of computer technology. Individual customers apply to a par-

ticipating bank which is part of the Bankamericard system for the extension of credit by the issuance to the applying customer of a credit card. The bank also makes contracts with merchants and vendors of goods and services. A card holder may purchase goods or services from any participating merchant or various member establishments anywhere in the world and charge his purchase on his credit card.

After an individual holder of a card issued by this defendant charges goods or merchandise, his charge ticket is deposited by the selling merchant at the bank with which such merchant has contracted and the latter is given credit to its account for the amount of the charge ticket less an agreed discount. If the bank is one other than the defendant, the ticket is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred by it to the transmitting bank. When the ticket reaches the defendant Bank, it is fed into its computer and is thereby charged to the card holder's account.

Once the purchase is made the customer is granted several choices or options. The customer determines the timing of his purchases or borrowings. If he is billed at the end of each month, a purchase made near the first of the month is not billed for almost thirty days. When he receives the billing, he may wait thirty additional days to pay without incurring any service charge and about 35% of the bank's customers do not incur any service charge at all. In any event, there is no service charge for the period from the date of purchase to a date which is thirty (30) days after the initial billing, which allows a free credit use period of up to approximately sixty (60) days, depending on the timing of the purchase in relation to the billing date. In many instances, delayed deposits of charge drafts by the merchants can extend this free time up to ninety

(90) days. If the customer does not choose in any given month to pay that month's billing in full at the end of thirty days after billing, he may elect to pay in installments, and it is within his discretion to determine the amount of the first payment, subject to a minimum requirement. He may pay the minimum ($10.00 or 5%) or any amount between 5% and 100% and vary this at will from month to month. A service charge is then applied on the remaining balance and it appears on the next billing. Different customers have different paying preferences and the preferences may be changed and varied at the option of the customer provided the payments do not fall below the minimum required.

On the date appointed for billing of a particular card holder's account, the computer is programmed to add charges, subtract credits, add any finance charge due under the defendant's contract with the customer and generate a statement reflecting all such transactions. This statement, together with all of the customer's charge tickets which have accumulated since his last billing are then mailed to him. The data which the computer tapes contain are updated from period to period as the process goes on. Transaction data is not permanently retained on the magnetic tapes. Data is printed and retained in the form of "printouts" which are generated many times throughout a billing cycle and on microfilm which is made of all charge tickets, credit transactions and statements.

From the procedure outlined above, it is apparent that the effective rate of service charges actually paid will vary from one account to another and within each account from month to month or from time to time. Indeed, the witness called by plaintiff as an expert admitted that in view of these options and variables, the effective rate paid would vary from month to month and from

day to day and there would be some periods where the effective rate paid would be above and some where it would be below even 8% simple interest. To determine this crucial question of the effective rate actually paid, a reconstruction of each account, either totally or in some substantial respect, would be necessary before the Court or a jury could determine either liability or amount.

The cost of researching and reconstructing 90,000 accounts, each involving numerous transactions, from microfilm records, is the subject of estimates which vary widely, due in some part to disagreement as to the extent of the reconstruction required and the method to be used, but in any event, the cost in time and money is very substantial, ranging from $367,700.00 to over $3,432,000.00 to cover the four year period.

Even preliminary to this endeavor is the matter of giving notice to at least 90,000 potential class plaintiffs, the cost of which is also substantial.

Another facet of the case has to do with the ability of potential class member plaintiffs to secure relief, if any is due, outside of the class action arena. Pertinent to this question is the fact that Mississippi provides small claims courts conveniently throughout the state which handle a multitude of small claims such as those which might arise from usury. The amount of individual claims over the four year suit period will, of course, vary, but if usury has been committed, as the plaintiff claims, in respect to all finance charges at the rate of 18% per annum, most, if not all individual claims would be substantial. With claims outgrowing from accounts with average balances of $100.00 to $1,000.00, the ad damnum at 18% per annum (doubled) would range from a low of $144.00 to a high of $2,880.00, plus pre-judgment legal interest, and

fall within the jurisdiction of justice courts, county courts and circuit courts, depending upon amounts. Many lawyers throughout the state habitually handle cases in this range. Unlike the highly complex anti-trust cases which have found more than average favor as class actions, there is nothing unduly complex involved in prosecuting actions based on claims for usury. If a case has merit, both client and lawyer make recoveries adequate to justify litigation on an individual case basis. On an equal division arrangement, the client still recovers all interest paid, plus legal interest from the date paid. The lawyer recovers a like amount for his services, because of the 100% penalty which is mandatory in all usury recoveries against national banks.

Against this factual background, the Court will proceed to a discussion of the reasons which have influenced the Court's decision to reject the use of the class action device under Rule 23 in this case.

Under Rule 23, the Court must first determine whether the prerequisites of subpart (a) have been met and additionally whether at least one of the three provisions of subpart (b) is applicable. In reaching a conclusion, the Court adopted a pragmatic approach in an earnest effort to balance the spirit of the Rule with fundamental rights and traditional notions of fair play and equal justice for all alike.

The burden of proof and of persuasion rests throughout upon the plaintiff who seeks to represent a class of numerous individuals. *Poindexter* v. *Teubert*, 462 F.2d 1096 (CA4, 1972); *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707 (CA10, 1973). The broad terms of Rule 23 have been recognized as calling for the exercise of some considerable discretion of a pragmatic nature. *Ratner* v. *Chemical Bank*

New York Trust Co., 54 F.R.D. 412 (S.D. N.Y. 1972). See also: *Shumate & Co.* v. *National Assn. of Securities Dealers*, 509 F.2d 147 (CA5, 1975).

Speaking for the Court in *Eisen* III (*Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA2, 1973)), Judge Medina observed that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree" and the blame is placed in part upon the "erroneous and frustrating view" that some way "must" be found to entertain the case as a class action. There is no compulsion written into Rule 23.

On the contrary, the compulsion is to search the facts of each case to determine whether justice to all and the efficient administration of justice will best be served by the use of such a device in the circumstances of the particular case at hand.

In this connection, it is not irrelevant to consider who is to benefit and who is to suffer and how and to what extent.

Another consideration is the effect of the class action device on the defendant who finds himself suddenly confronted with thousands of lawsuits, all built into one, and who is faced with claims for damages and penalties reaching astronomical amounts, in this case $14,000,000.00, of which one-half is a statutory penalty,—enough to seriously endanger if not to destroy the very solvency of the bank. The threat implicit in this situation has been referred to as "legalized blackmail." *Eisen* III, 479 F.2d at 1019.

Other courts have placed emphasis upon the undesirable "horrendous penalty" that can be generated by the pursuit of class actions to recover damages and penalties. Cf. *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D. N.Y. 1972); *Rogers* v. *Coburn Finance*

Corp., 54 F.R.D. 417 (N.D. Ga. 1972); *Gerlach* v. *Allstate Ins. Co.*, 338 F.Supp. 642 (S.D. Fla. 1972). When suffering on one side is intense and the benefit on the other is minimal, if any, the Court must proceed with due caution to avoid an injustice, especially when it appears, as here, that each individual who may have an interest is free and able to pursue his own remedy.

In sum, the allowance of class action status in this case will threaten the defendant with a horrendous penalty, and will benefit individual customers little, if at all. On the other hand, to deny the motion will harm no one who sincerely desires to prosecute a claim against the bank, because the statute of limitations has been suspended (*American Pipe and Const. Co.* v. *Utah*, 94 S.Ct. 756, 414 U.S. 538 (1974)), and everyone has a forum available for prosecution of his claim in the traditional manner.

This brings the Court to the question of whether the case is manageable as a class action and the related question of whether common questions predominate.

One directive of Rule 23 is that the Court evaluate "the difficulties likely to be encountered in the management of a class action." Commenting upon the quoted directive the Supreme Court in its review of *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974)) said:

> ". . . Commonly referred to as 'manageability,' this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. . . ." (94 S.Ct. at 2146, 417 U.S. at 164).

The *Eisen* cases, both *Eisen* II and *Eisen* III, include one admonition which deserves threshold emphasis. Judge

Lumbard, in his dissenting opinion in *Eisen* II (*Eisen* v. *Carlisle and Jacquelin*, 391 F.2d 555 (CA2 1968)), observed:

> ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . . ." (391 F.2d at 572).

The majority in its opinion in *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 479 F.2d 1005 (CA2 1973)) sounded the same note with the observation:

> ". . . Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. . . ." (479 F.2d at 1008).

In its review of *Eisen* III, the Supreme Court of the United States indicated no disagreement whatever with the stated truism. Moreover, this series of decisions, including that of the Supreme Court of the United States, makes it clear that in making the determination of the lack of manageability and superiority and of other necessary prerequisites to the class action approach, the so-called "class" does not ever become a legal entity or a litigant apart from the individual members of the class.

In short, even if the present action wears the cloak of a class action, the individuals composing the class still must be dealt with as individuals and each individual's case must stand or fall upon its own merits.

As a predicate for developing the testimony of the witness offered by plaintiff as a computer expert, the plaintiff's ultimate contention or theory of the case was stated into the record as follows:

> ". . . The contention is that the only relevant factors in computing the refund are the amount of service charges or finance charges billed during the suit period and the amount paid during the suit period." (Copeland dep., p. 46).

Looking solely to these factors asserted as the "only relevant factors," plaintiff would limit the case in its first stage to a computation of the dollars paid by *all* credit card customers in response to service charges for the suit period (initially 24 months but expanded by supplemental complaint to four years). The total of all service charges for all accounts for the four year period, fairly estimated at $7,000,000.00, would then be multiplied by two to create a $14,000,000.00 "fund" which the bank would be expected to pay into Court or disburse as directed, after, of course, deducting attorneys' fees to plaintiff's counsel and other expenses incurred in administration of the case. In phase two, a calculation of dollars paid during the suit period by each customer is contemplated and the amount, after deducting attorneys' fees and expenses, prorated in some fashion not explained, would then be automatically disbursed. All of this, according to the plaintiff is to be done by devising new programs for the bank's computers.

One trouble with the plaintiff's approach thus far is that there is and can be no cause of action for recovery of interest *charged* but only for recovery of interest *paid*. In order to amount to actionable usury, the dollars paid must convert into an *effective* percentage *rate* which exceeds the maximum per annum percentage rate found to be allowed by the law. In this case, the dollar amount charged or paid may or may not convert into an effective percentage rate in excess of the rate found to be allowed by law, depending upon the rate charges in relation to

the time the transactional credit is used by the borrower or customer.

The alternative is to examine and reconstruct each card holder account, which cannot be done without examining each transaction from the microfilm records and either producing copies of each document involved or keypunching the detailed information therefrom into a reprogrammed computer system, the cost and time for which varies from several hundred thousand to several million dollars.

This case is different from one where liability can be shown as to all class members, with only the amount of damages to be determined as to each. *Shumate & Co.* v. *Nat. Assn. of Security Dealers*, 509 F.2d 147 (CA5, 1975).

This Court rejects plaintiff's contrary premise and finds as a fact that each account would have to be reconstructed and individually examined in order to determine liability on the charge of usury as well as the amount in case liability were found to exist. In other words, the Court would be faced with some 90,000 separate cases for trial, possibly by jury, on issues first of liability and then on damages, and there is no way that the defendant may be computerized into mass liability or mass damages in the circumstances of this case. In addition, there are some 11,000 delinquent accounts involved, which would or could become counterclaims and require adjudication. Issues of fact affecting only individual members of the class clearly predominate.

The possibility that the defendant, faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and

disruption of its normal business functions is not a result to be either forced or applauded by this Court. Nor is the Court called upon to run the substantial risk of another *Eisen* "Frankenstein monster posing as a class action." (*Eisen* II, 391 F.2d at 572; *Eisen* III, 94 S.Ct. at 2148, 417 U.S. at 169).

Since the plaintiffs seek to represent a class of individuals who are strangers and who have no voice in the selection of a class champion, the Court is obliged to look closely to the ability of the plaintiffs to adequately represent the class. It is not enough that competent lawyers have committed themselves to the legal representation, although the existence of competent counsel is certainly a prerequisite to adequate representation. In the instant case, the Court is concerned that the stake of the nominal plaintiffs is small and there is no showing that they are either willing or able to finance the litigation as a class action. At the very least, a large sum must be committed at the front end of a class action approach to provide the notice to the class members which due process requires. *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974). The postage alone on 90,000 notices would equal $9,000.00 and the cost of labor and supplies would be quite substantial, and this is only the beginning of economic problems which would plague the case as a class action requiring reconstruction in some form of 90,000 odd accounts over a four year period.

At a conference with the Court, the lawyers for the nominal plaintiffs indicated a willingness to advance the cost of the notice and look to their clients for repayment if the case were lost, but to expect the Court to assume that the nominal plaintiff, with very little involved, would be willing or expected to discharge the client's liability

to reimburse the attorneys is too much. This may be to prefer rich representatives to poor ones, but in this type of case there is no compulsion that there be a representative at all and if there is to be one, he must have the ability, economic and otherwise, to serve in his self-appointed position. Cf. *P.D.Q. Inc. of Miami* v. *Nissan Motor Corporation In U.S.A.*, 61 F.R.D. 372 (S.D. Fla. 1973), and *Sayre* v. *Abraham Lincoln Federal Savings & Loan Assn.*, 65 F.R.D. 379 (E.D. Pa. 1974).

Finally, the Court must determine whether the procedural device, if applied in the circumstances of this case, would do violence to the substantive law made applicable to claims for the penalty of usury by state statutes and decisions, because Rule 23, like the other federal rules of civil procedure, may not abridge, enlarge or modify any substantive right. 28 U.S.C. §2072. As pointed out in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (CA2, 1973):

> ". . . Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" (28 U.S.C. §2072).

Generally, the receipt of interest for the loan of credit is not inherently evil. The common law did not condemn the practice or limit the amount. 55 *Am. Jur.* 324; §3. Usury laws derived from the efforts of local lawmakers to strike a balance of fairness to lenders and borrowers alike, having due regard to the economic necessities in the particular locality involved. The right of the states to legislate and formulate public policy in this area cannot be disputed

and the right to legislate and determine policy includes the incidental right to condition or limit enforcement of enacted usury laws expressly and by a judicial policy determination.

If Mississippi has an ascertainable policy for determining what is or is not a "fair" method for adjudicating the extent of the accountability of lenders who are alleged to have received excessive interest under state law, then that policy cannot be ignored either as substantive law or as bearing upon the question of whether a Rule 23 aggregation against the lender is superior for the required "fair" adjudication of the controversy.[1]

The Court concludes that under the substantive law of Mississippi, claims for usury are currently viewed as actions for a penalty and are strictly personal to the borrower and that the action may not be maintained by anyone except the borrower or his legal representative in the traditional sense and that the claim is not subject to assignment to another for collection or otherwise. Specifically, Mississippi law denounces the aggregation of individual usury claims as a *"legal fraud"* upon, and therefore as being *unfair* to the lender.

The aggregation of usury claims is against public policy in Mississippi and is stoutly condemned by its case law.[2]

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1. An overwhelming number of courts have ruled against requested spurious class action treatment of Truth-in-Lending actions. See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (CA3), *cert. den.* 419 U.S. 885 (1974). One reason is that the policy underlying the law is inconsistent with an aggregation of claims to produce excessive penalties. Analogizing, this Court perceives no good reason why like respect should not be accorded to state policy where state laws are invoked as a basis for recovery.

2. There is a sharp conflict of authority on the question of whether an action for usury is exclusively personal and nonassignable, but Mississippi takes a positive stand on the point. See Anno. 82 A.L.R. 1008 and 134 A.L.R. 1335.

A leading case is *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561, 134 A.L.R. 1330 (1941).

In this case the plaintiff, Fry, was a customer of and borrower from the defendant Layton, who was in the small loan business. He filed a suit seeking recovery for usury paid on his own loan and for that paid by eighteen other customers similarly situated who had assigned their claim to him. The Court held that Fry could not recover usury paid as assignee of others similarly situated. This was not grounded on procedure but upon the substantive policy and law of Mississippi as it relates to usury actions. The Court said:

> "As was said by this Court in Byrd et al v. Newcomb Mill & Lbr. Co., 118 Miss. 179, 79 So. 100, 101: 'The statute protects and safeguards the borrower by penalizing sharply the lender in the usurious contract; but it was not meant to give to the borrower any unjust advantage of the lender. Its good purpose should not be perverted into a source of legal fraud by borrowers upon lenders.' "

The Court concluded:

> "We hold that appellee, as assignee, cannot recover on these claims, but since he appears to have been the borrower upon two of them, the case is reversed and remanded." (2 So.2d at 565).

See also: *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (1974), citing and following *Fry* v. *Layton, supra,* wherein the Court said:

> "This Court has held that the forfeiture provisions of the usury laws are highly penal in nature and must be strictly construed. (Citing cases)." (300 So.2d at 456).

There is nothing contra in the National Banking Act. The federal law fixes no interest rate limits apart from local law and condemns no usury apart from state law. The federal statutes reach only to the point of assuring that national banks are not treated less favorably than state banks or other competitive lenders in the interest charge area and of limiting the penalty for violating state usury laws, in any event, to double the amount of interest actually paid. Indeed, like Mississippi, the National Banking Act expressly limits the right to sue for usury to "the person by whom it has been paid or his legal representative," 12 U.S.C. 86, again leaving to state law the question of who is a "legal representative" who may maintain such an action. See *Louisville Trust Co.* v. *Kentucky National Bank*, 87 Fed. 143 (D. Ky. 1898), and cases annotated to 28 U.S.C. §86. State laws differ as to the definition of a "legal representative", but Mississippi happens to limit the term to exclude even voluntary assignees of borrowers, to the ultimate substantive end that the lender may not be faced in any case with an aggregation of claims for the usuary penalty in the hands of a stranger to the individual loan transactions, such being viewed as a "legal fraud". *Fry* v. *Layton, supra,* and *Liddell* v. *Litton Systems, supra.* There is no indication of a Congressional interest to encourage litigation in this area or to override state policy.

Since the Mississippi statute law alone determines the matters of both interest and the existence of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction

invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.[3]

Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the "fair" adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a "legal fraud" by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud.

Turning, finally, in partial summary, to the specifics of Rule 23, the Court finds that the numerosity, commonality and typicality requirements of subpart (a) are present but that the plaintiffs cannot fairly and adequately protect the interests of the class, because they are neither able nor willing to finance the case as a class action.

Subparts (b)(1) and (2) are inapplicable. See *Goldman* v. *The First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenny* v. *Landis Financial Group, Inc.*, 349 F.Supp. 939 (N.D. Iowa, 1972); *Eisen* III, 479 F.2d

3. Attempted federal court actions against state banks or other lenders would fail in most cases for lack of the minimum jurisdictional amount, if not for lack of diversity. Cf. *Snyder* v. *Harris*, 394 U.S. 332, 89 S.Ct. 1053 (1969). If the federal court should allow aggregation of claims for usury against national banks, viewed by Mississippi as a "legal fraud" and non-maintainable under its usury laws, the result would be to allow the perpetration of legal frauds by local standards upon national banks but not upon state banks or local lenders, since these could not be reached by the Rule 23 procedural device. Cf. *Union National Bank* v. *Louisville N.A. & C. Ry. Co.*, 163 U.S. 325, 16 S.Ct. 1039 (1896); *Daggs* v. *Phoenix National Bank*, 177 U.S. 549, 20 S.Ct. 732 (1900). On the point that local law determines who may maintain an action for usury to the end that equal treatment may be had by all, see *Meadow Brook National Bank* v. *Recile*, 302 F.Supp. 62 (E.D. La. 1969); *Municipal Leasing Systems* v. *Northampton National Bank of Easton*, 382 F.Supp. 968 (E.D. Pa. 1974).

1005 (CA2, 1973); *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974), footnote 4.

Subpart (b)(3) conditions have not been met. The proof fails to show that questions of law or fact common to members of the class predominate over questions affecting only individual members; while there are some questions common to all, each individual case presents its own questions of fact and its own problems on issues of both liability and damages. By pragmatic standards, the case is unmanageable as a class action.

A class action is not superior to other available methods for the *fair* and *efficient* adjudication of the controversy, especially in view of (1) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (2) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender; (3) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Banking Act; (4) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys and (5) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

The motion for an order that this case proceed as a class action is denied. The cause will proceed upon the individual complaints as in other cases.

We are of the opinion that this Opinion and the Order which will be entered pursuant hereto involve a controlling

question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate determination of the litigation. The order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C. §1292 and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of this Opinion and Order to be entered pursuant hereto.

This 27th day of September, 1975 at Biloxi, Mississippi.

/s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX B

FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT

[549-550]

Came on for approval the calculation of the amount for which judgment is to be entered as presented by plaintiffs and pursuant to the interlocutory order heretofore entered in this cause, and the Court finding that plaintiffs' calculation is correct and in conformity with the directions of said interlocutory order and that judgment should be entered accordingly in favor of each plaintiff pursuant to the offer of judgment as made by defendants;

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That the plaintiff, Robert L. Roper, do have and recover of and from defendants the principal sum of $683.30 plus legal interest in the sum of $206.12, making a total of $889.42 for which judgment is rendered.

2. That the plaintiff, Jack Hudgins, do have and recover of and from defendants the principal sum of $322.70 plus legal interest in the sum of $100.84, making a total of $423.54 for which judgment is rendered.

3. That the judgment in favor of each of the plaintiffs bear interest at the rate of 8% per annum from its date until paid and that each of the plaintiffs do have and recover their costs of Court to be taxed by the Clerk.

This judgment is entered pursuant to the offer of judgment as made by defendants for the amount demanded by the named plaintiffs in the original complaint, as

amended, and in the supplemental complaint as calculated by plaintiffs pursuant to the interlocutory order heretofore entered and is entered without waiver on the part of defendants of any defenses and without admission by the defendants of any liability to the named plaintiffs or others and is without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

The defendants may discharge their liability hereunder by depositing the sum awarded herein with the Clerk of the Court, pursuant to Rule 67 of the Federal Rules of Civil Procedure and may take the Clerk's receipt therefor, and the Clerk thereupon shall forthwith remit the amounts adjudged to the respective parties on their request.

SO ORDERED AND ADJUDGED on this the 15 day of July, 1976.

APPENDIX C

CLERK'S RECEIPT FOR DEPOSIT [551]

The undersigned Clerk in and for the jurisdiction aforesaid does hereby acknowledge receipt of the sum of $889.42 for payment of judgment of Robert L. Roper and the sum of $423.54 for payment of judgment of Jack Hudgins, pursuant to authorization as contained in the "FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT" dated and entered on the 15th day of July, 1976.

DATED this 15th day of July, 1976.

APPENDIX D

NOTICE OF APPEAL

TAKE NOTICE that ROBERT L. ROPER and JACK HUDGINS, on behalf of all others similarly situated to themselves and on whose behalf the named Plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

NO. 76-3600

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF ALL OTHER SIMILARLY SITUATED
Plaintiffs-Appellants

vs.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE
Defendants-Appellees

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION

Now come the appellees, (collectively called "Bank"), and respectfully move the Court for an order dismissing the Notice of Appeal and for cause, would show the following:

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certification of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The following supporting papers are attached as an Addendum to this Motion: (reference to papers omitted)

Respectfully submitted,

/s/ Vardaman S. Dunn
Vardaman S. Dunn,
Attorney for Appellees

APPENDIX F

Robert L. ROPER et al.,
Plaintiffs-Appellants,

v.

CONSURVE, INC., d/b/a BankAmericard Center, and Deposit Guaranty National Bank, Jackson, Mississippi,
Defendants-Appellees.

No. 76-3600.

United States Court of Appeals,
Fifth Circuit.

Aug. 24, 1978.

Credit card holders brought class action against national bank on behalf of all other Mississippi holders of credit cards issued by bank, alleging that charges made were usurious under Mississippi law. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., denied certification following evidentiary hearing and, after bank tendered two class representatives payment in full of amount each individually claimed, entered judgment on behalf of plaintiffs, and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) despite bank's offer to pay off named plaintiffs, named plaintiffs were not precluded from appealing denial of class certification; (2) class representation was adequate, and (3) class action was superior method of proceeding.

Reversed and remanded.

Thornberry, Circuit Judge, specially concurred and filed opinion.

1. Federal Civil Procedure (Key) 1698

Where there is determination that class is not maintainable, notice requirements of class action rule's dismissal or compromise provision do not apply, at least where dismissal and settlement of action do not directly adversely affect rights of individuals not before court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

2. Federal Civil Procedure (Key) 1696

By very act of filing class action, class representatives assume responsibilities to members of class, and they may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

3. Federal Courts (Key) 544

Defendant's satisfaction of representative plaintiffs' claims could not preclude them from appealing denial of class certification nor did it excuse them from their duty of doing so absent express approval by trial court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

4. Federal Courts (Key) 544

Member of putative class may appeal denial of certification, even though it has been decided that claims of named plaintiff lack merit. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

5. Federal Courts (Key) 544

An individual plaintiff who has already prevailed in trial court may appeal denial of class certification. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

6. Federal Courts (Key) 544

Individual plaintiff who loses on merits may appeal denial of class certification. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

7. Federal Civil Procedure (Key) 164

Even if named plaintiffs in class action had been satisfied with offer of judgment and had not objected, named plaintiffs continued to maintain stake in procuring class-wide relief. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure (Key) 164

Where only major cost to be advanced before it could be determined whether defendant was liable was that of class notice, where postage for such notice, if individual mailing was required, would have been about $15,000, where counsel offered to advance that sum looking to named plaintiffs for repayment if required, where named plaintiffs offered note and mortgage on realty as security, and where named plaintiffs' counsel also offered to give bond to guarantee that notice costs would be met, named plaintiffs adequately established their ability to finance litigation for purposes of class certification. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

9. Federal Civil Procedure (Key) 164

Neither satisfaction nor denial of individual plaintiffs' claims, if effective, necessarily precluded their serving as adequate representative of class. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 182.5

Where credit card holders brought class action against national bank on behalf of 90,000 Mississippi residents who

held credit cards issued by bank alleging that charges made were usurious under Mississippi law, where claims were relatively small, averaging less than $100 each, where question of law involved applied alike to all, where individual fact determinations could be reached by using objective criteria and assistance of computer, and where potential class members could not effectively secure relief by another type of action, and where proposed class was peculiarly manageable plaintiffs were entitled to certification of class. Fed. Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 182.5

In class action brought by credit card holders against national bank on behalf of all other Mississippi holders of credit cards issued by bank in which plaintiffs alleged that charges made were usurious under Mississippi law, common questions predominated for purposes of saitsfying class action rule, and issues unique to each claim were not so complex as to make costs of determination prohibitive or to require individual evidentiary hearings. Fed. Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

12. Federal Civil Procedure (Key) 161

Class action rule was designed to prevent problem of wasteful and uneconomical multiple individual actions, Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

13. Federal Civil Procedure (Key) 161

Because considering financial impact of judgment in determining whether to certify class, presupposes success on the merits and requires trial court to express an opinion on harshness vel non of particular remedy prior to trial itself, it ought to be allowed only in extreme cases. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

14. Federal Civil Procedure (Key) 182.5

Attitude of Mississippi law disfavoring usury suits did not preclude bringing of suit by credit card holders against national bank as class action since action was regulated by federal law and since state law, even if relevant, would yield to federal class action rule. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

15. Usury (Key) 82

Under Mississippi law usury claims are penal and are viewed as personal to borrower; aggregation of such claims is condemned.

16. Banks and Banking (Key) 270(1)

National Bank Act adopts usury laws of states only insofar as they severally fix rates of interest; sole particular in which national banks are placed on an equality with natural persons is as to rate of interest, and not as to character of contracts they are authorized to make. National Bank Act, 12 U.S.C.A. §§ 85, 86.

17. Banks and Banking (Key) 270(1)

Provisions of National Bank Act looking to local law as surrogate federal law for determining permissible interest charges were designed by Congress to place national banks on plane of competitive equality with other lenders in respective states. National Bank Act, 12 U.S.C.A. §§ 85, 86.

18. Federal Civil Procedure (Key) 182.5

Difficulties in management of class action suit brought by credit card holders against national bank did not preclude bringing of suit as class action, where all members of proposed class lived in one state, where defendant had

each member's address on computer, where itemized history of each account could readily be obtained, and where substantial costs would be involved only if bank was found to be liable on plaintiffs' usury claims. Fed.Rules Civ.Proc. rule 23(d)(3), 28 U.S.C.A.

19. Federal Civil Procedure (Key) 182.5

Possible assertion of counterclaims by national bank in class action brought against it by credit card holders did not preclude bringing of suit as class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WISDOM, THORNBERRY, and RUBIN, Circuit Judges.

RUBIN, Circuit Judge:

This case presents two class action questions: whether the class action claim and, indeed, the entire controversy became moot when, after the trial court denied certification following an evidentiary hearing, the defendant bank tendered to the two class representatives payment in full of the amount each individually claimed and judgment was entered on their behalf; and, if not, whether a class action is superior to other available means for the fair and efficient adjudication of a claim for usurious charges on behalf of a class potentially comprising 90,000 holders of credit cards issued by a national bank. Having concluded that the defendants cannot moot the class claim by attempting to pay off the class representatives, we decide also that a class action is not only superior to other methods but singularly appropriate for the adjudication of this controversy, and, therefore, remand the case for further proceedings.

I.

Facts

Two holders of credit cards issued on the "BankAmericard" plan sued the national bank that had issued the cards under the National Bank Act, 12 U.S.C. §§ 85 and 86, contending that the charges made were usurious[1] on behalf of themselves and all other Mississippi holders of the same cards issued by the defendant.[2] Under the plan, card holders can buy merchandise or services from third persons who have contracts with the bank or other member banks, and charge their purchases. The merchants then sell the credit instruments to the bank at a discount. The bank bills the card holder; if the payment is not made within a certain time, it charges interest on the unpaid balance. During the suit period, there were 90,000 to 100,000 individual card holders.

The trial court declined to certify the action as a class action. The bank then made an offer of judgment to each of the two individual plaintiffs, without admitting liability, and tendered to each the maximum amount that each could have recovered ($889.42 and $423.54, respectively) by depositing this sum in the registry of the court. The two named plaintiffs have never accepted the tender, but judgment based on defendant's offer of judgment was entered over plaintiffs' objection.

The credit card system, as the experienced trial judge correctly stated, is made possible by the use of computers.

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1. The complaint alleges the rates exceeded those permitted by Section 36, Chapter 2 of the Mississippi Code (1942) as amended. *See* Title 75, ch. 17, §§ 1, 17, Mississippi Code (1974).

2. The original complaint also charged a violation of the Truth-in-Lending Statute, 15 U.S.C. § 1640, *et seq.*, but that claim has been dropped.

The computer charges each transaction to the card holder's account. If the credit instrument is placed by the merchant with some other bank, it is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred to the transmitting bank.

For the bank's convenience, the accounts are divided into ten separate groups, called cycles. The credit card accounts are posted on ten days a month; the charges for holders whose names are in each cycle are posted in one day. The computer is programmed so that, on the billing date, it adds charges, subtracts, credits, adds any finance charge due under the BankAmericard plan and prepares a statement reflecting each transaction. The statement is then mailed to the customer.

The data in the computer is stored on magnetic tapes. These are updated from period to period. Transaction data is not retained permanently on the tapes, however. It is printed (on "printouts"), and the printouts are retained. A microfilm record is made of all charge tickets, credit transactions and statements.

During the period in question, the bank made a monthly service charge of 1½% on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill 1½% of the unpaid portion of the prior bill, which was shown as the new balance. This is the charge contended to be usurious. Thus, if a customer bought merchandise and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days, and would then have 30 more days within which

to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments; in that case, the service charge was made only on unpaid installments.)

About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always 1 1/2% on the unpaid balance; if the effective rate were computed based on the number of days from the date the bank received each charge until it was paid, that effective rate would vary for each customer each month. There was evidence that both the finance fees *charged* to each card holder and the fees each *actually paid* during the suit period can be tabulated, although this requires clerical assistance in addition to the use of the computer. The plaintiff's expert witness testified that the total cost of such preparation, including computation of the refund due each class member if the action were successful, would be $45,575.

It is also possible to reconstruct every account in full by again processing the transactions. The plaintiffs' expert estimated the cost of this, if it were required by the court, to be $125,000. He testified that there are contractors available to perform such services. The defendant's expert testified that, if it were necessary to reconstruct every individual account, the cost might range from $367,700 to $3,432,000.

The computer could, of course, easily be used to give notice to members of the class and sort out persons who are not class members (for example, because they opened accounts after the class was certified).

II.

Mootness

[1, 2] The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. One well-publicized danger in the class action is the possibility that it will be used to collect quick, undeserved damages; this type of effort to establish a quick coup has been called a "strike suit." We have held that prior to certification a class action cannot be dismissed merely because the representatives are satisfied, unless there is notice to the putative class of the proposed dismissal and a determination by the court that the dismissal is proper, as required by Rule 23(e) F.R.C.P. *Pearson* v. *Ecological Science Corp.*, 5 Cir. 1975, 522 F.2d 171, 177, *cert. denied sub nom.*, 1976, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762, and cases cited therein. Where, as here, there is a Rule 23(c)(1) determination that the class is not maintainable, the notice requirements of Rule 23(e) do not apply if "dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.

[3-6] Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of

their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. *See* generally, Miller, An Overview of Federal Class Actions: Past, Present and Future (Federal Judicial Center, 1977) at 57-63. A member of the putative class may appeal the denial of certification, even though it has been decided that the claims of the named plaintiffs lack merit. *United Airlines, Inc.* v. *McDonald*, 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. An individual plaintiff who has already prevailed in the trial court may appeal the denial of class certification. *Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701-702, and cases cited therein; *Esplin* v. *Hirschi*, 10 Cir. 1968, 402 F.2d 94, *cert. denied*, 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459. An individual plaintiff who loses on the merits may also appeal a denial of certification. *Horn* v. *Associated Wholesale Grocers, Inc.*, 10 Cir. 1977, 555 F.2d 270, 276-277; *Donaldson* v. *Pillsbury Co.*, 8 Cir. 1977, 554 F.2d 825, 831, note 5, *cert. denied*, 1977, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128, and cases cited therein. There is no reason why an individual plaintiff to whom payment of his claim has been tendered should have less standing in the light of the judicial responsibility to ensure that class representatives adequately represent the interests of the class and do not settle either their claims or the class action without court approval.

In *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 10 (slip op. 6531, 6540, note 10), we noted that, if the representative's claim became moot prior to appellate review of a denial of certification based upon a full evidentiary hearing, there are several reasons for permitting the representative to appeal that decision.

In particular, unless the representative is permitted to appeal, whether the alleged error in denying certification will be reviewed will depend upon the intervention of a putative class member who, under *Pearson*, is not entitled to notice of the individual compromise and may be unaware that the putative class is without a representative who has a viable claim. Review of alleged judicial error ought not be foreclosed so fortuitously. Additionally, such intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal.

[7] Constitutional requirements are met: a viable controversy still exists with respect to the maintainability determination. The only issue is who may raise it. Here, plaintiffs have a stake because of their objection to the compromise. However, even had they been satisfied with the offer of judgment, the result would not change; the individual plaintiffs would maintain a stake in procuring class-wide relief. *Gelman* v. *Westinghouse Electric Corp., supra.* Moreover, they maintain a nexus with the class and, for reasons detailed subsequently, continue to be adequate representatives for purposes of Rule 23(a)(4) despite the mootness of their claims. *See Satterwhite, supra,* ..... F.2d at ....., note 11 (slip op. at 6541, note 11); *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34, 42. Hence, the issue is properly before us on appeal.

III.

The Class Action

The lower court, after several conferences with counsel and a full study of the evidentiary materials, concluded that, although the numerosity, commonality and typicality

requirements of Rule 23(a)(1), (2) and (3) Fed.R.Civ.Proc. are met, the requirement of Rule 23(a)(4) that the plaintiffs fairly and adequately protect the interests of the class is not satisfied because of the inability of the named plaintiffs to finance the case. It found that the requirements of Rule 23(b)(3)[3] were not met because plaintiffs failed to establish that questions of law and fact common to class members predominate, and because a class action is not superior due to: (1) the availability of the traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims are aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counter-claims are filed. Upon review, we find that the requirements of Rule 23(a)(4) are met, and that the court went beyond the bounds allowed for the exercise of its discretion with respect to the Rule 23(b)(3) determination. *See Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.*, 5 Cir. 1975, 509 F.2d 147, 155, *cert. denied*, 1975, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97.

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3. The court found that the requirements of Rule 23(b)(1) were not met because the prospective class consisted entirely of small claimants who could not afford to litigate their individual actions; hence there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . ." and that Rule 23(b)(2) did not apply because the actions were not predominantly for injunctive or declaratory relief. *See Eisen* v. *Carlisle & Jacquelin*, 1974, 417 U.S. 156, 163, 94 S.Ct. 2140, 2146, note 4, 40 L.Ed.2d 732. It is not necessary for us to review these determinations because of the availabiilty of Rule 23(b)(3) certification. However, we note that the court's finding with respect to Rule 23(b)(1) [that individual actions are unlikely] is inconsistent with its determination that traditional procedures for prosecuting individual actions provide meaningful alternatives to class certification.

A. *Adequacy of Class Representation*

[8] No question is raised about the ability and willingness of the named plaintiffs fairly and adequately to protect the interests of the class, but the defendants do question the plaintiffs' ability to finance the litigation.[4] Their counsel are qualified and experienced. *Eisen* v. *Carlisle & Jacquelin* (*Eisen II*), 2 Cir. 1968, 391 F.2d 555, 562. The only major cost to be advanced before it is determined whether or not the defendant is liable is that of a class notice. *See Oppenheimer Fund, Inc.* v. *Sanders*, 1978, ... U.S. ....., 98 S.Ct. 2380, 57 L.Ed.2d 253. The postage for such a notice, if individual mailing is required, would be about $15,000. Counsel properly offered to advance that sum looking to the named plaintiffs for repayment if required. Their clients offered a note and mortgage on realty as security. Counsel has also offered to give a bond to guarantee that the notice costs will be met. The sufficiency of such action has been established, *Sayre* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, E.D.Pa.1974, 65 F.R.D. 379, *modified*, D.C. 1975, 69 F.R.D. 117; *Halverson* v. *Convenient Food Mart, Inc.*, 7 Cir. 1972, 458 F.2d 927, 931 n. 7.

[9] Neither the satisfaction nor denial of the individual plaintiffs' claims, if effective, necessarily precludes

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4. According to Professor Arthur Miller, An Overview of Federal Class Actions: Past, Present and Future, (F.J.C.1977), at 32:

> There have been instances in which a district judge has concluded that the representatives are inadequate, at least in part, because they do not appear to have the financing to maintain the action. But this is a rather tricky consideration that must be treated with some care because if financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case is a factor, it probably should not be a determinative factor.

their serving as adequate representatives. We have permitted representatives to serve the class despite adjudications determining that their individual claims are not viable *if* they are members of the class and maintain an adequate nexus with it. *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34; *Huff* v. *N.D Cass Co. of Ala.*, 5 Cir. 1973, 485 F.2d 710, 712-714 (*en banc*). *See Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701; *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 8 (slip op. 6531, 6538, note 8), approving this jurisprudence and distinguishing *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 1977, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453, on the basis that the named representatives in that case were not members of the class at the time the suit was filed nor at the time of the certification decision. The relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation. The defendant's decision to confess judgment has not affected the vigor with which plaintiffs have pursued the class claims, and we find no basis for concluding that they have not satisfied the requirements of Rule 23(a)(4).

B. *Superiority of a Class Action*

[10] This is a classic case for a Rule 23(b)(3) class action. The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation. The claims are relatively small, said even by the plaintiffs to average less than $100 each, and the question of law is one that applies alike to all. While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps

with some clerical assistance. It will not be necessary to hear evidence on each claim.

A number of similar class actions have been certified by district courts,[5] and appear to have been susceptible of management. Certification will achieve one of the primary purposes of the class action, "enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co. of California*, 1972, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184. We consider separately each of the factors that are argued to militate against certification.

1. *Common Issues*

[11] The legal issues, as the trial court correctly noted, are whether the finance or service charge made is subject to the Mississippi statute on usury—for such a charge might be considered exempt from the statute; whether the charge is interest and, if so, what rate of interest is permissible; and whether the rate actually paid in any given case is to be determined on a daily, monthly, or other basis, and what dates are to be used for determination of the rate. If the legal issues are resolved in favor of some or all of the members of the class, there would then be factual questions; whether the permissible rate was exceeded in any given case, and, if so, by what amount.

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5. *Cosgrove* v. *First & Merchants National Bank*, E.D.Va. 1975, 68 F.R.D. 555; *Weit* v. *Continental Illinois National Bank & Trust Co.*, N.D.Ill.1973, 60 F.R.D. 5, *appeal dismissed*, 7 Cir. 1976, 535 F.2d 1010; *Cohen* v. *District of Columbia National Bank*, D.D.C.1972, 59 F.R.D. 84; *Partain* v. *First National Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56; *Zachary* v. *Chase Manhattan Bank*, S.D.N.Y.1971, 52 F.R.D. 532, together with a number of other cases reported by published decisions. *See* dicta in *Fisher* v. *First National Bank of Omaha*, 8 Cir. 1977, 548 F.2d 255, 262.

In determining these issues, it may (or may not, dependent upon Mississippi law), be important that the effective daily rate or monthly rate paid would vary from one account to another. If Mississippi law proscribes or permits a 1½% charge *per se*, the effective daily rate will be unimportant. If Mississippi law determines whether a charge is usurious depending not on its nominal terms but on the average daily rate charged, then whether the effective rate is based upon the period commencing when the bank receives the bill or when the customer receives the bill may determine whether the rate is usurious. Additionally, if the period ends on the date the charge is actually paid, as opposed to the date the charge is due, the effective rate charged a customer who paid his account five days after receiving a billing showing a finance charge (35 days after the charge was computed at the rate of 1½% a month) would be different from the rate paid by another customer who paid 29 days after receiving the bill (59 days after the charge was compiled).

Thus, it may (or again, may not, dependent on whether *any* charge made was usurious under Mississippi law, or whether every 1½% charge made was excessive, or whether some other standard applies) be necessary to reconstruct each card holder's account. Neither the trial court nor we can know in advance of a substantive decision whether it is necessary to make a computation (after all, the charge may be valid); or, if it is, how Mississippi law determines what is usurious and by what standards the computations are to be made. The best scenario for the utility of a class action is constructed if the trial court decides that the charge can never be considered usurious; the defendant disposes of 90,000 potential claims in one coup. The worst hypothesis will materialize if the court decides that Mississippi law requires the rate to be computed on each individual account on a daily-rate basis.

Whether the testimony of plaintiffs' expert (who has done a similar job before) or defendant's expert (who obviously fears disaster) be accepted, no computation need be made, and no costs need be incurred until the trial court determines the applicable Mississippi rule and, if Mississippi law appears to create liability, sets standards for its application, perhaps by an inexpensive preliminary sample of accounts.

Hence, common questions predominate for purposes of satisfying Rule 23(b)(3); the issues unique to each claim, if any are raised, are not so complex as to make the costs of determination prohibitive, or to require individual evidentiary hearings.

2. *Availability of Other Relief*

The potential class members cannot effectively secure relief, if any is due, by another type of action. The suggestion by the defendant that each plaintiff might resort to a Mississippi small claims court assumes that the procedures of such courts are adequate for the sophisticated type of claim here presented, and that Mississippi state courts could handle this volume of suits. Moreover, the national bank defendant could remove every such case to federal court. 28 U.S.C. §§ 1337 and 1441(b); *see Partain* v. *First Nat'l. Bank,* 5 Cir. 1972, 467 F.2d 167. *Cf. Marquette Nat'l. Bank* v. *First Nat'l. Bank,* D.Minn.1976, 422 F.Supp. 1346.

What is more important is that each plaintiff has the right to seek relief in federal court. If even one-twentieth of them chose to do so, the court would have 5000 suits to dispose of, approximately four times the total number of suits of all kinds filed with its clerk annually.[6] Should

6. Management Statistics for United States Courts 1977, at 60. One thousand two hundred eighty nine (1,289) cases were filed in the Southern District of Mississippi in the twelve month period ending June 30, 1977.

a federal forum be used for such individual actions, the cost of each action would surely increase, as would the cost of determining damages. The alleged statutory wrong may go unchallenged because the costs of proof exceed the likely recovery. *See* Wright & Miller, Federal Practice and Procedure, § 1779 at 61 (1972 ed.).

[12] Even assuming *arguendo* that multiple individual actions were feasible, they would be wasteful and uneconomical. This is precisely the problem that Rule 23 was designed to prevent. "The very purpose to be served by a class action is the opportunity it affords to prevent a multiplicity of suits based on a wrong common to all." *Green* v. *Wolf Corp.,* 2 Cir. 1968, 406 F.2d 291, *cert. denied,* 1969, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766.

3. *Impact on Defendant*

In Truth-in-Lending actions, Congress has manifested its concern about suits potentially ruinous to defendants by limiting recovery. 15 U.S.C. § 1691e. There appears to be no comparable limit for class actions under the National Banking Act although recovery is limited in actions of this type to twice the amount of the interest paid. 12 U.S.C. § 86. *See McCollum* v. *Hamilton Nat'l. Bank,* 1938, 303 U.S. 245, 247, 58 S.Ct. 568, 570, 82 L.Ed. 819; *Coral Gables First Nat'l. Bank* v. *Constructors of Fla., Inc.,* Fla. App. 1960, 119 So.2d 741; *First Nat'l. Bank* v. *Lowery,* 1937, 234 Ala. 56, 173 So. 382; *First Nat'l. Bank* v. *Davis,* 1911, 135 Ga. 687, 70 S.E. 246. We find no evidence that Congress otherwise sought to protect the net worth of national banks against damaging suits if, in fact, they overcharged their customers. If it be assumed, however, that courts should heed hurricane warnings about potential disasters to defendants and use them as a reason to evacuate class actions then, we consider this to be less than catastrophic.

If it is assumed that the defendant is correct when it states that about 35% of the card holders paid no service charge, then the number of potential claimants is 60,000. If the average recovery is $100 each, the potential liability is large ($12,000,000) but not ruinous to a defendant with capital accounts of $45,000,000 and with assets of $520,-000,000.

[13] Unlike the situation under some statutes, we are not concerned with a fixed minimum penalty of a substantial amount for a technical violation, *see Partain* v. *First Nat'l. Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56, 60-61, that if magnified, would exact a punishment unrelated to statutory purposes. *Compare Ratner* v. *Chemical Bank N. Y. Trust Co.*, S.D.N.Y.1972, 54 F.R.D. 412. Because considering the financial impact of a judgment presupposes success on the merits and requires the trial court to express an opinion on the harshness *vel non* of a particular remedy prior to trial itself, it ought to be allowed only in extreme cases.

4. *Mississippi Usury Law and Aggregation*

[14-17] Nor is the attitude of Mississippi law disfavoring usury suits sufficient to deter the entertainment of this class action. Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned.[7] *Fry* v. *Layton*, 1941, 191 Miss. 17, 2 So.2d 561.[8] Of course, we deal here with a

7. Class action treatment in the present case is not the same as aggregation of claims. Recovery for each individual member of the class is sought, and for no more than the amount of the illegal interest extracted from each class member and the equal penalty payable to each class member.

8. In *Fry* v. *Layton, supra*, the Mississippi statute required a forfeiture of both interest *and principal*. The appellee had sought to buy up claims from borrowers of a loan company and thereafter aggregate such claims and recover of the lender both interest *and principal*. This type of scheme was denominated "legal fraud" by the Mississippi court. 2 So.2d at 565.

claim against a national bank, controlled in matters of procedure by the Federal Rules of Civil Procedure. *John R. Alley & Co.* v. *Federal Nat'l. Bank of Shawnee*, 10 Cir. 1942, 124 F.2d 995; the action is regulated by federal law, although the federal statute may look to local law as surrogate federal law for determining the permissible interest charges. 12 U.S.C. § 85.[9] As we said in *Partain* v. *First National Bank of Montogmery*, 5 Cir. 1972, 467 F.2d 167, 173:

> This interplay between the federal statute and State usury laws is elucidated by *Evans* v. *National Bank*, 251 U.S. 108, 40 S.Ct. 58, 64 L.Ed. 171 (1919): "The National Bank Act establishes a system of general regulations. It adopts usury laws of the states *only* insofar as they severally fix the rate of interest"; by *National Bank* v. *Johnson*, 104 U.S. 271, 26 L.Ed. 742 (1881): "The sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make . . . ."

(Emphasis added & original)

Hence, the state law with respect to aggregating usury claims that derive from state law is inapposite with respect to claims founded on federal statute, and would yield to Rule 23, F.R.C.P., even if relevant.

9. These provisions of the Act were designed by Congress to place national banks on a plane of competitive equality with other lenders in respective states by adopting state law with respect to permissible interest rates. *Fisher* v. *First National Bank*, 8 Cir. 1977, 548 F.2d 255; *First National Bank in Mena* v. *Nowlin*, 8 Cir. 1975, 509 F.2d 872; *Brown* v. *First Nat'l City Bank*, 2 Cir. 1974, 503 F.2d 114; *Monongahela Appliance Co.* v. *Community Bank & Trust, N.A.*, N.D.W.Va., 1975, 393 F.Supp. 1226, *aff'd*, 4 Cir. 1976, 532 F.2d 751.

5. *Manageability*

[18] The case presents no unusual difficulties in class management. While the class is large, it is peculiarly manageable. All the members live in one state, the defendant has each member's address on a computer; both that address and the itemized history of each account can readily be obtained.

After substantive rulings are made on the basic issues of liability and damage computation, the case is so manageable that a computer, either in the bank itself or leased elsewhere, can handle its *administration*—as distinguished from the ultimate computation which may in some instances require clerical personnel. The task is not a particularly difficult one when compared to the work that the bank ordinarily performs on its own computer. Under any theory the work involved in the refund computation procedure will represent only a small fraction of the work originally done on the credit card accounts by the bank's computer operation. The evidence shows that this ordinary work was done with such comparative ease that the computer could also do all of the other work of the bank, plus the work of 60 or 70 other banks under contract with it and continue to advertise for more business.

We do not agree with the trial court that there is a serious possibility that the defendant, "faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions." We do not minimize the effect of "strike actions," and we certainly do not applaud them. But, as we have indicated, the specter of large cost will materialize only if, after a preliminary hearing, it appears likely that damages are actually due a large number of class members. Only then,

after liability is determined, will there be substantial cost, either in defense or in payment of damages.

[19] The lower court alluded to the potential problem of counter-claims. This likewise can be handled, if that point is reached, by adopting standards and classifying the claims. *See Weit* v. *Continental Illinois Nat'l. Bank,* N.D. Ill. 1973, 60 F.R.D. 5. If the court should conclude at any time that the entire group of counter-claims makes the plaintiffs' claims on behalf of such persons unmanageable, the court has the continuing authority under Rule 23 to issue a supplemental order excluding counter-claim defendants from the plaintiff class or separating and severing the class into two different classes, one with counter-claims and one without counter-claims. As Judge Johnson said in *Partain, supra*:

> The potential assertion of counter claims against these few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled. At the same time the rights of the defendant should be protected.

59 F.R.D. at 59.

Of course, the easiest way for any court to handle complex class litigation is simply to deny certification; this may have the real effect of permitting a defendant to violate a federal statute either with impunity or minor expense. In the present case few of the individual claimants would have the resources necessary to litigate against a well-financed defendant. This consideration underlies the decision of the Seventh Circuit in *Hohmann* v. *Packard Instrument Co.*, 7 Cir. 1968, 399 F.2d 711, which found a similar situation a classic one for sustaining the class action

involved. Quoting its prior decision in *Weeks* v. *Bareco Oil Company*, 7 Cir. 1941, 125 F.2d 84, 90, the court said:

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

399 F.2d at 715.

For these reasons, we REVERSE and REMAND to the trial court for further proceedings consistent with this opinion.

THORNBERRY, Circuit Judge, specially concurring:

I write separately to express my views on the mootness issue discussed in Part II of Judge Rubin's thorough and scholarly opinion, which I fully join in all other respects. Although I agree that a defendant should not be able to terminate a class action by tendering a few dollars to a putative class representative, I cannot subscribe to the sweeping dicta in the majority opinion that treats fact situaions foreign to the instant case. Here the named plaintiffs strenuously objected to the defendant's "settlement" offer, and it cannot be said that a true settlement took place. The voluntary acceptance by named plaintiffs of such an offer is not involved, however, and I see no need to address the mootness question that it would present.

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504—598-6514
600 Camp Street
New Orleans, La. 70130

October 20, 1978

TO ALL PARTIES LISTED BELOW:

No. 76-3600—Robert L. Roper, et al. vs. Consurve, Inc. etc. and Deposit Guaranty National Bank, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Clare F. Sachs
Deputy Clerk

cc Mr. William Roberts Wilson, Jr.
Mr. Toxey Hall Smith, Jr.
Mr. Frederick G. Helmsing
Mr. Champ Lyons
Mr. Vardaman S. Dunn

APPENDIX H

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-3600

D. C. Docket No. CA-4261-(N)
ROBERT L. ROPER, ET AL.,
Plaintiffs-Appellants,

versus

CONSURVE, INC., d/b/a BankAmericard Center, and DEPOSIT GUARANTY NATIONAL BANK, Jackson, Mississippi,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX I

UNITED STATES CONSTITUTION

Article III.—The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX J

12 U.S.C., §85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank

is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub.L. 93-501, Title II, § 201, 88 Stat. 1558.

APPENDIX K

12 U.S.C., §86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198.

APPENDIX L

MISSISSIPPI CODE OF 1972

CHAPTER 17

Interest

New Sections Added

SEC.

§ 75-17-1. Legal rates of interest and finance charges.

(1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two hundred fifty thousand dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed two hundred fifty thousand dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day

of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of eight hundred dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1¼%) per month to that portion of the applicable balance which is in excess of eight hundred dollars ($800.00) but not greater than twelve hundred dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds twelve hundred dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either

within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than six hundred dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of six hundred dollars ($600.00) but not greater than eighteen hundred dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of eighteen hundred dollars ($1800.00) but not greater than forty-five hundred dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of forty-five hundred dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This

paragraph (7) does not limit or restrict the manner of contracting for the finance charge whether by way of add-on, discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed one thousand dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than one thousand dollars ($1,000.00) but does not exceed two thousand five hundred dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than two thousand five hundred dollars ($2,500.00).

(9) The term "finance charge" as used in this section and in sections 75-17-13, through 75-17-17, 63-17-13, 75-67-127 and 75-67-217 means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, ar-

ranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this section and sections 75-17-13 through 75-17-17, 63-17-13, 75-67-127 and 75-67-217, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this section shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by

paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

SOURCES: Laws, 1972, ch. 436, § 1; 1973, ch. 387, § 1; 1974, ch. 564, § 1, eff from and after July 1, 1974, eff from and after passage (approved March 27, 1973).

§ 75-17-17. Law governing loans made or credit extended prior to July 1, 1974.

Loans made and credit extended prior to July 1, 1974 shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to July 1, 1974 shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after July 1, 1974 shall conform with the provisions of sections 63-17-13, 75-17-1, 75-17-13 through 75-17-17, 75-67-127 and 75-67-217.

SOURCES: Laws, 1974, ch. 564 § 7, eff from and after July 1, 1974.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,
Petitioner,

vs.

ROBERT L. ROPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Certiorari Filed November 29, 1978
Certiorari Granted March 5, 1979

INDEX

DOCKET ENTRIES*

[Docket 1-6]

Date	*Proceeding*
9/17/71	Complaint, original and four copies, filed.
11–17–71	Amended Complaint, original and four copies, filed.
1–6–72	Motion of Bankamerica Service Corporation to dismiss the Amended Complaint, with NOTICE that motion be heard on 1-19-72 at 9 AM, with certificate of service and Supplemental affidavit of D. R. McBride, with attachments, filed.
2–9–72	Motion of Jack E. Hudgins to enter appearance by additional named party plaintiff, with certificate of service, Attorneys were notified by Mrs. Swetman to contact Judge Nixon to arrange for hearing date for motion, filed.
2–23–72	Motion of Robert L. Roper to amend plaintiff's Complaint, with certificate of service, with NOTICE that motion be heard before Judge Nixon on 2-23-72 at 9 AM, with attached exhibit A, filed.
2–28–72	ORDER, dismissing as to BankAmerica Service Corporation, Bank of America National Trust & Savings Association, and National BankAmericard, Inc. No notice thereof save the entry of this Order being necessary, filed and entered in OB-1972, page 221. Copies mailed to attorneys, WLN
3–6–72	ORDER allowing amendment and plaintiff allowed 10 days, filed & ent in OB 1972-page 235-A.

*Entries relating to unsubstantial matters have been omitted.

Date	*Proceeding*
3–6–72	Amended complaint, original and two (2) copies, filed. (Class Action)
4–21–72	Motion for Order determining whether class action is to be maintained and for designation of class representative, with certificate of service, filed. No notice necessary at this time per WLN.
10–16–72	Memorandum Opinion and Order—1. The defts Motion for dismissal for lack of jurisdiction is denied. 2. Motion of deft. Bank for dismissal, or in alternative for change of venue, is denied. 3. Deft's Motion for Dismissal for improper joinder of dauses [sic] of action or in alternative to strike and dismiss pltff's second cause of action is denied, filed and entered in OB-1972, pages 991-993. Copies mailed to attorneys. WLN (Copies mailed to attorneys.)
11–10–72	PROCEDURAL ORDER—1. Deposition of Defts. postponed until 11-15-72 at 2 PM. 2. Defts. not required to answer Interrogatories heretofore filed by pltf's until expiration of 30 days after ruling of Court on Pltf's Motion to proceed as class action. Defts required to answer amended complaint within 10 days from 11-6-72. 4. Deft's not required to elect whether to request trial by jury when filing answer but may, by notice, within 10 days after Court has ruled on Pltf's motion for class action, filed and entered on OB-1972, pages 1067-1068. Copies mailed to attorneys. WLN
11–17–72	Answer of Defendants to amend "Class Action Complaint", with certificate of service, with Exhibit A and B, filed.

Date	*Proceeding*
4–30–73	Appearance of Robert S. Vance, Jack C. Gallalee and Frederick G. Helmsing as counsel for palintiffs [sic], with certificate of service, filed.
6–13–73	MEMORANDUM OPINION AND ORDER: Ordered that pltf's motion to maintain second cause of action as a class action is hereby denied; pltf's motion to allow Jack Hudgins to intervene as party pltf is granted; this Court reserves ruling on pltf's motion to maintain his first cause of action as a class action until completion of additional discovery directed to issues outlined herein; discovery is hereby reopened for this purpose and shall proceed in accordance with F.R.C.P.; although this Court anticipates the necessity of hearings directed to discovery issues, each side shall submit monthly reports by letter concerning progress of this discovery and suggested times for submission of supplemental briefs, filed and entered OB 1973, pages 696-701. (WLN (Copies mailed to attorneys)
8–9–73	Plaintiff's motion to allow associate counsel to appear pro hac vice, with certificate of service, with attached certificates of good standing of Robert S. Vance, Jack C. Gallalee and Frederick G. Helmsing, filed.
1–7–74	ORDER—plaintiffs given leave to file supplemental complaint seeking similar relief as original complaint—FURTHER—Defendants move, plead or otherwise respond to said supplemental complaint on or before 20 days after filing of same, filed and entered in OB-1974, page 17. Copies to attorneys.

Date	Proceeding
1–15–74	Supplemntal complaint, with certificate of service filed.
2–5–74	Ans ver of defendants to supplemental complaint, with certificate of service, filed.
5–6–74	Motion of plaintiffs for partial summary judgment, filed.
7–5–74	Amended Motion for partial summary judgment as to issue of liability, with certificate of service, filed.
9–3–74	ORDER—consideration by Court of motions for partial summary judgment be abated pending final determination of Court as to whether this cause shall proceed as a class action under Rule 23, said abatement to be without prejudice to right of moving parties to renotice said motions for hearing after final determination of class action issue before Court. Plaintiff may file a brief on this issue on or before September 30, 1974 and defts. may file a responsive brief on or before 14 days thereafter, filed and entered in OB-1974, pages 888-889. Copies to attorneys.
9–29–75	MEMORANDUM OPINION—Order to be entered, filed.
10–15–75	ORDER: Order Overruling Motion and Denying Class Action Status—It is ordered that motion of pltf and intervening pltf that this case proceed as a class be and it is hereby denied, and this cause shall proceed in all respects upon the indiv. complaints as in other cases, subject to a temporary stay of proceedings as ordered below. This Court being of the opinion that the decision denying class action status in this case

Date	Proceeding
	as evidenced by the Memorandum Opinion dated 9-27-75, and as further evidenced by this order, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal to the Court of Appeals for the Fifth Circuit may materially advance the ultimate determination of the litigation; It is further ORDERED that the order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C., §1292, and all proceedings in this Court are hereby stayed for a period of 30 days pending possible appellate review of the said opinion and order, filed and entered in O.B. 1975, pages 1316-1317. Copies mailed to attys.
11–14–75	NOTICE OF APPEAL given that Robert L. Roper and Jack Hudgins, on behalf of themselves and all others similarly situated, plaintiffs named above appeal to the United States Court of Appeals for the 5th Circuit from the Order of the United States District Court for the Southern District of Ms. in the above-styled cause filed and entered on on 10-15-75 in which the Honorable Judge Nixon declined to permit the action to proceed as a class action, Certified copy to 5th Circuit Court.
11–14–75	Cash Bond in sum of $250.00, filed.
11–17–75	Mimeo Notice of Appeal mailed to Bobbie Price with copies to Denton B. Jordan, Robert L. Daniels and William A. Davis.
12–12–75	ORDER—From Fifth Circuit Court of Appeals—leave to appeal from the interlocutory Order of

Date	Proceeding
	the U. S. District Court for the Southern District of Ms. entered on 10-14-75 is DENIED, filed and entered in OB-1975, page 1670.
1-16-76	ORDER—appeal of the plaintiffs noticed under 28 U.S.C. 1291 is hereby dismissed, filed and entered in OB-1976, page 47. Copies to attorneys.
3-12-76	Motion of Plaintiffs for Summary Judgment and attached NOTICE that motion be heard before a Judge on 3-25-76 at 10 AM in Biloxi, Ms., with certificate of service, filed.
3-17-76	Motion of defendants to strike plaintiffs' motion for Summary Judgment, with attached NOTICE that motion be heard before Judge Nixon on 3-25-76 at 10 AM at Biloxi, Ms., with certificate of service, filed.
5-10-76	Motion of plaintiffs for Summary Judgment, with attached NOTICE that motion be heard before Judge Nixon on 6-9-76 at 10 AM in Biloxi, Ms., with certificate of service, with attached Affidavit of Federal Reserve Discount Rate, with certificate of service, with attached Affidavit of G. Richard Thompson, Ph.D., supporting plaintiff's Motion for Summary Judgment, with certificate of service, with attached exhibits, filed.
6-1-76	Response of defendants to pltfs' Motion for Summary Judgment, with cert. of service, filed.
6-1-76	Offer of defendants to enter judgment as by consent and without waiver of defenses or admission of liability, with cert. of service and attachments, filed.

Date	Proceeding
6-9-76	INTERLOCUTORY ORDER On Plaintiffs' Motion for Summary Judgment and Defendants' Offer to Enter Judgment as by Consent: pltfs submit said calculation of amount for which judgment is to be entered within 14 days from 6-9-76, filed and entered in O.B. 1976, pages 823-824. Copies mailed to attys (copy handed to Vardeman Dunn).
6-9-76	ORDER: Second count of pltf's Complaint, as last amended, relating to the Federal Truth-in-Lending Act is dismissed with prejudice, filed and entered in O.B. 1976, page 836. Copies mailed to attys.
6-30-76	Plaintiffs' calculation of damages, with certificate of service, filed.
7-15-76	FINAL JUDGMENT on Plaintiffs' Motion for Summary Judgment and Defendants' Offer of Judgment as by Consent: Pltf Robert L. Roper recover of defts principal sum of $683.30 plus legal interest in sum of $206.12 making total of $889.42 for which judgment is rendered plaintiff Jack Hudgins recover of defts principal sum of $322.70 plus legal interest in sum of $100.84 making total of $423.54 for which judgment is rendered; judgment in favor of each of pltfs bear interest at 8% per annum from its date until paid and each of pltfs recover their costs of Court to be taxed by the Clerk; defts may discharge their liability by depositing sum awarded herein with Clerk of Court and may take Clerk's receipt therefor, and Clerk thereupon shall forthwith remit the amounts adjudged to respective parties on their request,

Date	Proceeding
	filed and entered in O.B. 1976, page 937-938. Copies mailed to attys.
7–15–76	Clerk's Receipt for Deposit in sum of $889.42 for payment of judgment of Robert L. Roper and sum of $423.54 for payment of judgment of Jack Hudgins, filed.
7–16–76	Bill of Costs in sum of $1,427.52, filed.
7–16–76	Bill of Costs in sum of $419.60, filed.
8–10–76	Notice of Appeal given that Robert L. Roper and Jack Hudgins, on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders. A certified copy mailed to Fifth Circuit Court.
8–10–76	Cash Bond in sum of $250.00, filed.
8–10–76	Mimeo Notice of Appeal mailed to Bobbie Price with copies to David Scott, Robert L. Daniels, Denton B. Jordan and William A. Davis.

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

No. 4261 (N)

ROBERT L. ROPER, on behalf of himself and all others similarly situated,
Plaintiff,

vs.

CONSURVE, INC., d/b/a BankAmericard Center, Jackson, Mississippi, and Deposit Guaranty National, Bank, Jackson Mississippi, a body corporate,
Defendants.

AMENDED CLASS ACTION COMPLAINT

(Filed March 6, 1972)

Comes now the above styled Plaintiff, representative Plaintiff, an adult resident citizen of Jackson County, Mississippi, who files this complaint on behalf of himself and all others similarly situated within the State of Mississippi against Deposit Guaranty National Bank of Jackson, Mississippi, a corporation, organized and doing business as Deposit Guaranty National Bank of Jackson, Mississippi, and Consurve, Inc., a wholly owned subsidiary of the said Deposit Guaranty National Bank of Jackson, Mississippi, service of process upon the said Deposit Guaranty National Bank of Jackson, Mississippi as well as the said Consurve, Inc., may be had by service of process upon any officer of the said Deposit Guaranty National Bank of Jackson, Mississippi.

I

This cause of action arose within this District and Division. The Plaintiff's claim arises under Title 12 USCA, Section 85 and 86 and under Section 36, Chapter 2, *Mississippi Code, 1942,* as amended. This Court has jurisdiction of this cause without regard to the amount in controversy or the citizenship of the parties under the provisions of the Title 28, USCA, Section 1355, as well as other sections of the United States Code. The Defendant, The Deposit Guaranty National Bank of Jackson, Mississippi, is a National Bank subject to the provisions of the national bank act (Act June 3, 1964, c. 106, 13 stat. 99 et seq). All Defendants herein are subject to the laws of the State of Mississippi.

II

The Defendant, Deposit Guaranty National Bank of Jackson, Mississippi (hereinafter referred to as DGNB), acts, in this jurisdiction, through Consurve, Inc., which is a wholly owned subsidiary of the said DGNB. The Defendants, and each of them, or the both of them, one acting as a division of the other, engage in the business of extending loans and credit through the use of the credit plan and credit card commonly referred to as "BankAmericard". The Defendants furnish such cards upon applications of persons, or, on occasions, without applications or request. In practice, the Defendants encourage numerous merchants, dealers, professionals, etc., to subscribe to their service whereby a holder of the card charges purchases to his BankAmericard and the Defendants pay such merchants, etc., after deducting a percentage of the charge to the merchants as a service charge, thereafter, the Defendants bill the card holder. If the holder fails to pay the account promptly, the Defendants charges the

holder interest, sometimes disguised or referred as "Finance" or "Service Charges, in the amount of one and one-half (1, 1/2%) per cent per month, (or eighteen per cent (18%) per annum), on the unpaid balance. This charge of interest is regularly made by the Defendants in the course of their business.

III

Plaintiff on behalf of himself and all others similarly situated would show unto the Court that in the regular course of Defendants business the Defendants have willfully and knowingly taken, stipulated for, received, reserved and charged interest greater than that allowed by the laws of Mississippi, specifically section 36, Chapter 2, *Mississippi Code, 1942,* as amended, which, *inter alia,* provides that interest on all notes, accounts and contracts shall not exceed the rate of eight per cent (8%) per annum and if a greater rate of interest than eight per cent (8%) be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract is executed or executory. Said interest charged and received from Plaintiff and others similarly situated also exceeds the rate equal to one percentum or more to the discount rate on ninety day (90) commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the Defendant, DGNB, is located. Plaintiff, and other persons similarly situated within the State of Mississippi, have been charged, or are being charged, with such prohibited interest being in the amount of one and one-half (1 1/2%) interest per month on the unpaid balance of their accounts, or a total of eighteen per cent (18%) interest per annum, or more, if the said interest is compounded monthly.

IV

This action is a Class Action provided for by rule 23 of the Federal Rules of Civil Procedure and is brought by the named Plaintiff on his own behalf and on behalf of all other persons similarly situated. The names, addresses, and number of similarly situated persons, being holders of BankAmericards within the State of Mississippi who have been charged such prohibited interest on the unpaid balance of their accounts, are unknown to the named Plaintiff, but are, on information and belief, averred to be in excess of ten thousand (10,000) persons. Such persons are known by the Defendants and may be readily determined by records maintained by Defendants.

V

Claims of the Plaintiff and other persons similarly situated in this Class Action, are practically identical and represent substantially common questions of Law and fact. The common question of Law is whether the Defendants charged, or charge, or are charging, usurious interest in violation of Title 12, USCA, Section 85, and/or Section 36, Chapter 2, *Mississippi Code, 1942,* as amended. The common question of fact includes, but is not limited to, whether Plaintiff and other similarly situated as credit card holders, were charged, paid or billed, illegally, interest in excess of eight per cent (8%) per annum, or otherwise, all as set out above. The Allegations herein Represent a uniform and regular course of conduct engaged in by the Defendants against Plaintiff and members of the Class herein. The questions common to Plaintiff and members of the class predominate over any questions affecting individual members.

VI

A class action is a superior method for a fair and effective adjudication of the controversy. Prosecution of the Claims as a class action will fairly and adequately protect the interests of all members of the class. The interests of the Plaintiff are identical to interests of all persons within the class. Prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual plaintiffs, which would thereby establish incompatible standards of conduct for the Defendants. Maintenance of the action on behalf of the class would, as a practical matter, dispose of the interest of other the expense of trial and preparation therefor which require bringing separate actions. Plaintiff would show unto the Court that the Federal Court is a proper and just forum for the adjudication of the Claims of themselves and all others similarly situated inasmuch as a class action is not available in the state courts of the State of Mississippi; and the nature and type of the claims of the Plaintiff and all others similarly situated make it necessary that they be litigated in a class action because of the individual size thereof and the individual monetary amounts. Maintenance on behalf of the class would, as a practical matter, dispose of the interests of other members of the class not named as parties to this action and avoid the expense of trial and preparation therefor which require bringing separate actions.

VII

Plaintiff alleges that the Clerk of this Court be designated custodian of the funds and judgment to be paid Plaintiff and other persons similarly situated, by Defendants and the Clerk deposit said funds in a suitable

depository and, upon proper order of this Court, disburse said funds after deduction of necessary expenses and attorney fees to Plaintiff's attorneys herein of twenty-five per cent (25%) of the amount so paid, the same being reasonable by all standards, including that alleged and utilized by Defendants in suing certain members in of the class in State Courts for unpaid accounts.

VIII

SECOND CAUSE OF ACTION

And now for a Second Cause of Action Plaintiff on behalf of himself and all others similarly situated, realleges and reavers each and every, all and singular the allegations hereinabove made and for a second cause of action, reserving all rights and privileges, would show unto the Court that the Defendants, DGNB and Consurve, Inc. are liable to the members of the class for a failure to correctly specify the annual interest rate on its open credit extension accounts hereinabove mentioned, and would show unto the Court the following:

IX

Plaintiff, on behalf of himself and all other similarly situated would show unto the Court that the Defendant Bank and its wholly owned subsidiary, Consurve, Inc., have violated the disclosure requirements of the Truth-In-Lending Act when they fail to show the proper annual percentage rate of interest on the front and face of the statement to the Plaintiff and all others similarly situated under their open-end Consumer Credit Plan. Plaintiff would show unto the Court on behalf of himself and all others similarly situated that although the statements furnished holders of BankAmericards on the face of them

state the interest thereto as a finance charge in conclusive and definite terms and states no finance charge is added to the first month or when balance is paid in full within twenty-five days after date of statement, said disclosures are inadequate.

X

Plaintiff would further show unto the Court that the annual percentage rate as expressed on the monthly billing statement rendered by the Defendants is not a true proper or correct rate as charged by the Defendants. Plaintiff would show unto the Court on behalf of himself and the other members of the class that the actual percentage rate charged by the Defendants varies within any given monthly billing cycle period to such a degree that on occasions the Defendants will be charging 1.6, 1.7 or in some extreme cases 1.8% per month add-on percentage rate, which is grossly in excess of 1/4 of 1% more than 1 1/2% monthly add-on.

Plaintiff would show unto the Court that the DGNB and Consurve, Inc. are liable for violation of section 127 (B) (5) of the said Truth-In-Lending Act. Plaintiff would show unto the Court that the Defendants conduct is such as would preclude any "Good Faith" defense. Plaintiff, on behalf of the Class and himself would show unto the Court that the Defendants are in violation, therefore, of the Truth-In-Lending Act because, but not limited to, they have violated the requirements of Regulation "Z" (12 CFR 226) the same being regulations promulgated pursuant to the Truth-In-Lending Act. Plaintiff specifically charge the Defendants with violation of §226. 7¶ c, and other paragraphs setting forth the requirements of disclosure of annual percentage rate. Plaintiff alleges that the Defendants actually charge in excess of one-fourth of

one percent, on many occasions, above the stated 18% annual rate. Plaintiff charge Defendants with abjectly failing to state the true annual percentage rate within the nearest 1/4 or 1% on their statements as required by law.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff on behalf of himself and all others similarly situated, demands judgment of Defendants, to wit:

1. The sum of $5,000,000.00 together with interest according to law; or such other sum as represents the aggregate of the following (a) Twice the amount of interest paid within two years next preceding the filing of this complaint by all members of this class; and (b) such additional interest as has been charged to but not paid by members of the class within two years next preceding the filing of this complaint.

2. Any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be deemed appropriate by the Court.

3. Cost of this action as well as attorney fees in the amount of 25% as hereinabove alleged, or such other amount as may be deemed fit and proper by the Court.

4. Such other relief as the Court may deem just and proper.

Respectfully submitted,

Robert L. Roper, on behalf of himself, and all others similarly situated.

By: /s/ W. R. Wilson, J.
Attorney at Law
P.O. Box 1507
Pascagoula, Mississippi, 39567
(601) 769-1247

and

Toxey Hall Smith, Jr.
Attorney at Law
Wiggins, Mississippi
(601) 928-4247

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

MOTION FOR ORDER DETERMINING WHETHER CLASS ACTION IS TO BE MAINTAINED AND FOR DESIGNATION OF CLASS REPRESENTATIVE

(Filed April 2, 1972)

Comes now Robert L. Roper, individually and on behalf of all others similarly situated, and moves, under the provisions of Rule 23 (c) (1) for an order determining whether this action is to be maintained as a class action and for designation as class representative and for other relief specified in said Rule.

Respectfully submitted,

Robert L. Roper, Behalf of Himself
and all others similarly situated

By /s/Toxey H. Smith, Jr.
Attorney at Law
P. O. Drawer 8
Wiggins, Mississippi 39577
and

W. Robert Wilson, Jr.
Attorney at Law
3132 Canty Street, P.O. Box 1507
Pascagoula, Mississippi 39567

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

ANSWER OF DEFENDANTS TO AMEND "CLASS ACTION COMPLAINT"

(Filed November 17, 1972)

Now come the Defendants, Consurve, Inc., d/b/a Bank-Americard Center, and Deposit Guaranty National Bank, and for answer to the Amended "Class Action Complaint" say:

First Defense

Answering specifically the allegations of the Amended Complaint, Defendants say:

1. They admit that the Deposit Guaranty National Bank is a national bank subject to the provisions of the National Bank Act. They deny that the Court has jurisdiction of the parties or subject matter, there being no diversity of citizenship and the amount involved being less than the jurisdictional minimum. They deny that the Court has venue.

2. They deny the allegations of Paragraph II except that they admit that Consurve, Inc. is a wholly owned subsidiary of Deposit Guaranty National Bank, and, further answering, would explain that charges are made to some of the merchants who subscribe to the BankAmericard service, said charges being in various amounts based on volume and ranging from 0 to 5%; and finance charges are made to consumer customers in varying amounts under

varying circumstances, with each account being different, depending upon numerous variables.

3. They deny the allegations of Paragraph III and would show that there are several statutes of the State of Mississippi dealing with permissible interest or finance charges including Chapter 662, Mississippi Laws of 1972, specifically authorizing charges of 1½% per month on revolving charge accounts such as the accounts involved herein.

4. They deny the allegations of Paragraph IV, except they admit that the holders of BankAmericard Credit Cards within the State of Mississippi exceed 10,000 and, in fact, equal approximately 90,000.

5. They deny the allegations of Paragraph V.

6. They deny the allegations of Paragraph VI.

7. They deny the allegations of Paragraph VII.

[Answer to "Second Cause of Action"]

8. They deny the allegations of Paragraph VIII.

9. They deny the allegations of Paragraph IX.

10. They deny the allegations of Paragraph X.

Second Defense

If the Plaintiff otherwise would have a cause of action based on the charge of usury, which is denied, the Plaintiff is nevertheless barred by waiver and res judicata, and in support of this defense, Defendants would show:

In February of 1971, Consurve, Inc. filed an action in the County Court of Jackson County, Mississippi, being No. 12,033 on the docket of that Court against Robert L. Roper seeking recovery for the balance due on his Bank-

Americard Charge Account, plus attorney's fees. Robert L. Roper was duly served with a summons issued out of said Court to answer the declaration therein, but after entering an appearance, suffered default and failed to interpose a plea, defense or assertion of usury. A judgment was duly entered against Robert L. Roper in said cause in favor of Consurve, Inc. in the total amount of $2,782.94, plus Court Costs, and said Judgment having been rendered by a court of competent jurisdiction, became and is a final Judgment and entitled as such to full faith and credit. A true copy of the official Record in said Cause No. 12,033 is attached hereto as Exhibit A and incorporated herein by reference.

If usury occurred in reference to the account of Robert L. Roper, which is denied, such was merged into the Judgment in said Cause No. 12,033.

Plaintiff's complaint in this cause amounts to a collateral attack on the final Judgment of the County Court of Jackson County, Mississippi, in said Cause No. 12,033 and as such, fails to state a claim on which relief can be granted.

Third Defense

As an additional defense to Plaintiff's "Second Cause of Action", Defendants plead that the action is barred by the applicable statute of limitations and herein would show:

Plaintiff's "Second Cause of Action" alleges violation of a Federal Statute known as the Federal Truth-In-Lending Act, 15 U.S.C. 1640, and Subdivision (e) of said Act provides in pertinent part that: "Any action under this section may be brought . . . . within one year from the date of the occurrence of the violation."

Plaintiff's "Second Cause of Action" was not filed until March 6, 1972, when it was incorporated in the Plaintiff's "Amended Class Action Complaint" pursuant to leave granted on a motion for leave to amend filed February 23, 1972; but the last use made by Plaintiff of his Bank-Americard account occurred more than one year prior to the last above mentioned date and is, therefore, barred under the provisions of 15 U.S.C. 1640 (e).

Fourth Defense

Defendants deny that this cause should be allowed to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure or otherwise, but if the action is allowed to so proceed, Defendants reserve the right to defend and answer each and every claim which may thereby be brought into litigation herein, including the right as to each and all of such claims to interpose appropriate pleas of setoff and counterclaim.

SETOFF AND COUNTERCLAIM

Defendants aver that the Plaintiff, Robert L. Roper, is indebted to the Defendant, Deposit Guaranty National Bank, in the sum of $2,812.44 as of April 14, 1971, which said indebtedness arises from the use by Plaintiff of a BankAmericard Credit Card and which indebtedness is evidenced by and merged into a final Judgment of the County Court of Jackson County, Mississippi, Exhibit A to this Answer, and if the Defendant is found to be liable to the Plaintiff, Defendants demand the right of setoff and aver that they are entitled to have the indebtedness aforesaid credited thereon.

ANSWER TO DEMAND FOR JUDGMENT

Defendants deny that Plaintiff is entitled to the relief demanded in his "Amended Class Action Complaint", and again deny that this action can properly be given the status of a class action under Rule 23 of the Federal Rules of Civil Procedure or otherwise.

Respectfully submitted,

/s/ Vardaman S. Dunn
1741 Deposit Guaranty Bank Bldg.
Jackson, Mississippi
Attorney for Defendants, Consurve, Inc. and Deposit Guaranty National Bank

Of Counsel:
Cox & Dunn, Ltd.
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

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(Exhibits Omitted As Irrelevant to Issue)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

SUPPLEMENTAL COMPLAINT

(Filed January 15, 1974)

COME NOW, the Plaintiffs, Robert L. Roper and Jack Hudgins, on behalf of themselves and all others similarly situated, and file this Supplemental Complaint and for cause of action would show unto the Court the following facts, to-wit:

I.

Plaintiffs reallege and reaver, each and every, all and singular, every allegation of the original and amended complaints and incorporate the same herein by reference as if fully copied in words and figures herein.

II.

The named Plaintiffs on behalf of themselves and all others similarly situated, would show unto the Court that the Defendants, Consurve, Inc. and Deposit Guaranty National Bank, have continued to exact interest in the same manner, style and fashion as alleged in the preceding complaints and that they have continued to do so from the date of the filing of the original lawsuit down to, until, and inculding the present, and that the named Plaintiffs on behalf of themselves and the class would show unto the Court that the same relief prayed for and sought in the original and amended complaints should and ought to be granted to them and the class for the period between the filing of the lawsuit and the date of the filing of the supplemental complaint, all as provided for by law.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs sue and demand judgment on behalf of themselves and all others similarly situated in the same manner, style and fashion as sought in the original complaint and amended complaints for a supplemental period including the period from the date of the filing of the original lawsuit down to the date of the filing hereof, and Plaintiffs sue and demand damages for themselves and the class in double the amount of interest exacted from them and the class from the time of the filing of the original lawsuit down to, until and including the date of the filing of this supplemental complaint, and Plaintiffs pray on behalf of themselves and all others similarly situated that the interest charged but not yet collected be forfeited, and;

PLAINTIFFS PRAY that this Honorable Court set a reasonable attorneys fee out of the award to the class as the Court may deem fit and proper, and;

PLAINTIFFS RENEW THEIR DEMAND FOR JUDGMENT as set forth in the original complaint and the amended complaints filed subsequent thereto, in addition to the relief sought and demanded in this supplemental complaint.

Respectfully submitted,

Robert L. Roper and Jack Hudgins
By: /s/ Toxey Hall Smith, Jr.
Attorney at Law
114 Cavers Street
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(601) 928-3222
and

W. Roberts Wilson, Jr.
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(601) 769-1247

(Of Counsel, Robert Vance, Fredrick Helmsing and Jack Gallalee)

By: /s/ Roberts Wilson, Jr.
Of Counsel

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

ANSWER OF DEFENDANTS TO "SUPPLEMENTAL COMPLAINT"

(Filed February 5, 1974)

Without waiver of objections to jurisdiction or venue, and without waiver of the objections to the maintenance of this suit as a "class action", defendants answer the Supplemental Complaint as follows:

FIRST DEFENSE

The Supplemental Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

Neither the original plaintiff, Robert L. Roper, nor the intervening complainant, Jack Hudgins, has standing

to maintain the alleged cause of action set forth in the Supplemental Complaint for the reason that neither the original plaintiff nor the intervening plaintiff has transacted any credit card business with defendants since the filing of the Amended Complaint in this cause on March 6, 1972, and neither the original plaintiff nor the intervening plaintiff held a credit card during said period of time encompassed by the Supplemental Complaint.

THIRD DEFENSE

Defendants deny that this cause should be allowed to proceed as a class action under Rule 23 of the *Federal Rules of Civil Procedure,* or otherwise, but if the action is allowed to proceed under the Supplemental Complaint, defendants reserve the right to defend and answer each and every claim which may thereby be brought into litigation herein, including, as to each and all of such claims, the right to interpose appropriate pleas of set-off and counterclaim and to have all issues heard by a jury.

FOURTH DEFENSE

Answering specifically the allegations of the Supplemental Complaint, defendants say:

1. Paragraph number 1 of the Supplemental Complaint re-alleges and re-avers each and every and all and singular every allegation of the original and amended complaints and incorporates the same by reference; and in answer to this paragraph defendants re-allege and re-aver each and every, all and singular, every allegation, admission and denial of their answers to the original and amended complaints and incorporate the same herein by reference as if fully copied in words and figures herein; and defendants further incorporate as a part of their an-

swer all of the motions, pleas and objections heretofore filed in this cause and by reference make the same fully applicable to the Supplemental Complaint as if re-filed with this answer.

2. Answering paragraph 2, they admit that Deposit Guaranty National Bank has continued to do business under its credit card program in generally a similar manner, style and fashion as its business was conducted prior to the date of the filing of the last amended complaint herein, but they deny all of the remaining allegations of this paragraph of the Supplemental Complaint.

SET-OFF AND COUNTERCLAIM

As a part of the answer to the Supplemental Complaint defendants re-assert the set-off and counterclaim as incorporated in the answer of defendants to the amended "class action complaint."

ANSWER TO DEMAND FOR JUDGMENT

Defendants deny that plaintiffs are entitled to the relief demanded in the "Supplemental Complaint" and again deny that this action can properly be given the status of a class action under Rule 23 of the *Federal Rules of Civil Procedure,* or otherwise.

Respectfully submitted,

/s/ Vardaman S. Dunn
Attorney for Defendants

Of counsel:
Cox & Dunn, Ltd.
Post Office Box 1046
Jackson, Mississippi 39205

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

MEMORANDUM ORDER

(Filed September 29, 1975)

The original plaintiff, Robert L. Roper, and the intervening plaintiff, Jack E. Hudgins, former customers and "Bankamericard" card holders of the defendant, Deposit Guaranty National Bank of Jackson, Mississippi, brought this suit against the defendants on behalf of themselves and other Bankamericard card holders of the defendants. It was designated as a class action under Rule 23, Federal Rules of Civil Procedure, and although it named both of the above defendants, the real party in interest is Deposit Guaranty National Bank (Bank).

The Complaint sets forth two causes of action, the first of which alleges violations of the sections of the National Banking Act dealing with interest charges and penalties for exacting usury, 12 U.S.C. §§85 and 86; the second cause of action is based upon alleged violations of the federal Truth-in-Lending Act, 15 U.S.C. §1601, et seq.

The violations of law for which this action was brought were alleged to have been committed by the Bank in the administration of its credit card program known as "Bankamericard", which was inaugurated in 1968 and which developed between 90,000 and 100,000 individual credit card accounts.

Plaintiffs seek to qualify and act as class representatives for all Bankamericard credit card holders whose accounts were active within the four year period covered by the original and supplemental complaints filed herein,

or from September 18, 1969 until September 19, 1973. It is conceded by both sides that there were 90,000 or more card holders during this period of time. Furthermore, it is agreed that the defendant Bank is subject to the provisions of the National Bank Act of June 3, 1964, c. 106, 12 Stat 99 (Tit. 12 U.S.C. §1 ff).

This cause is now before the Court on the motion of the plaintiff for an order certifying this as a class action and for designation of a class representative. This Court initially found that neither the plaintiffs' first nor second cause of action could be maintained as a class action under Rule 23 and ordered that the motion to maintain the second cause of action based upon an alleged violation of the Truth-in-Lending Act as a class action be denied but reserved final decision on the class action question as related to the usury issue until the record was fully developed on the question of the over-all manageability of the case as a class action.

The parties have fully utilized all desired discovery, including taking of depositions, and have filed herein additional affidavits. These have been considered along with the evidence previously submitted, and in addition, the Court and counsel have engaged in several conferences following which both sides have submitted excellent briefs and have orally argued all facets of this matter.

The Court is now called upon to determine whether the conditions of Rule 23 have been met, including whether a class action under the circumstances of this case is superior to other available methods for the fair and efficient adjudication of this controversy which must be resolved by the exercise of an informed and sound discretion within the guidelines of the rule and cases construing it, taking due care in the process to avoid encroaching upon the substantive law of the forum to the extent that it

applies to the case sub judice and has not been pre-empted by federal law.

Before proceeding to decide this class action question, the Court notes that the merit issues herein include whether the so-called service charge is subject to Mississippi statutes on usury; what rate of interest is allowable on loans of credit; whether the effective rate actually paid in any given case is to be determined on a daily, monthly or other basis; and whether the rate so determined was exceeded in any given individual case. The Court may not proceed to decide these issues as long as the class action status of this case remains unanswered, because no merits determination of fact or law can be made without due process notice to all identifiable members of the proposed class, if this is determined to be a proper class action. *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140; 417 U.S. 156 (1974); *Miller* v. *Mackey International*, 452 F.2d 424 (5th Cir. 1971).

A modern credit card system such as the Bankamericard system is made possible by the utilization of computer technology. Individual customers apply to a participating bank which is part of the Bankamericard system for the extension of credit by the issuance to the applying customer of a credit card. The bank also makes contracts with merchants and vendors of goods and services. A card holder may purchase goods or services from any participating merchant or various member establishments anywhere in the world and charge his purchase on his credit card.

After an individual holder of a card issued by this defendant charges goods or merchandise, his charge ticket is deposited by the selling merchant at the bank with which such merchant has contracted and the latter is given credit to its account for the amount of the charge ticket

less an agreed discount. If the bank is one other than the defendant, the ticket is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred by it to the transmitting bank. When the ticket reaches the defendant Bank, it is fed into its computer and is thereby charged to the card holder's account.

Once the purchase is made the customer is granted several choices or options. The customer determines the timing of his purchases or borrowings. If he is billed at the end of each month, a purchase made near the first of the month is not billed for almost thirty days. When he receives the billing, he may wait thirty additional days to pay without incurring any service charge and about 35% of the bank's customers do not incur any service charge at all. In any event, there is no service charge for the period from the date of purchase to a date which is thirty (30) days after the initial billing, which allows a free credit use period of up to approximately sixty (60) days, depending on the timing of the purchase in relation to the billing date. In many instances, delayed deposits of charge drafts by the merchants can extend this free time up to ninety (90) days. If the customer does not choose in any given month to pay that month's billing in full at the end of thirty days after billing, he may elect to pay in installments, and it is within his discretion to determine the amount of the first payment, subject to a minimum requirement. He may pay the minimum ($10.00 or 5%) or any amount between 5% and 100% and vary this at will from month to month. A service charge is then applied on the remaining balance and it appears on the next billing. Different customers have different paying preferences and the preferences may be changed and varied at the option of the customer provided the payments do not fall below the minimum required.

On the date appointed for billing of a particular card holder's account, the computer is programmed to add charges, subtract credits, add any finance charge due under the defendant's contract with the customer and generate a statement reflecting all such transactions. This statement, together with all of the customer's charge tickets which have accumulated since his last billing are then mailed to him. The data which the computer tapes contain are updated from period to period as the process goes on. Transaction data is not permanently retained on the magnetic tapes. Data is printed and retained in the form of "printouts" which are generated many times throughout a billing cycle and on microfilm which is made of all charge tickets, credit transactions and statements.

From the procedure outlined above, it is apparent that the effective rate of service charges actually paid will vary from one account to another and within each account from month to month or from time to time. Indeed, the witness called by plaintiff as an expert admitted that in view of these options and variables, the effective rate paid would vary from month to month and from day to day and there would be some periods where the effective rate paid would be above and some where it would be below even 8% simple interest. To determine this crucial question of the effective rate actually paid, a reconstruction of each account, either totally or in some substantial respect, would be necessary before the Court or a jury could determine either liability or amount.

The cost of researching and reconstructing 90,000 accounts, each involving numerous transactions, from microfilm records, is the subject of estimates which vary widely, due in some part to disagreement as to the extent of the reconstruction required and the method to be used, but in any event, the cost in time and money is very sub-

stantial, ranging from $367,700.00 to over $3,432,000.00 to cover the four year period.

Even preliminary to this endeavor is the matter of giving notice to at least 90,000 potential class plaintiffs, the cost of which is also substantial.

Another facet of the case has to do with the ability of potential class member plaintiffs to secure relief, if any is due, outside of the class action arena. Pertinent to this question is the fact that Mississippi provides small claims courts conveniently throughout the state which handle a multitude of small claims such as those which might arise from usury. The amount of individual claims over the four year suit period will, of course, vary, but if usury has been committed, as the plaintiff claims, in respect to all finance charges at the rate of 18% per annum, most, if not all individual claims would be substantial. With claims outgrowing from accounts with average balances of $100.00 to $1,000.00, the ad damnum at 18% per annum (doubled) would range from a low of $144.00 to a high of $2,880.00, plus pre-judgment legal interest, and fall within the jurisdiction of justice courts, county courts and circuit courts, depending upon amounts. Many lawyers throughout the state habitually handle cases in this range. Unlike the highly complex anti-trust cases which have found more than average favor as class actions, there is nothing unduly complex involved in prosecuting actions based on claims for usury. If a case has merit, both client and lawyer make recoveries adequate to justify litigation on an individual case basis. On an equal division arrangement, the client still recovers all interest paid, plus legal interest from the date paid. The lawyer recovers a like amount for his services, because of the 100% penalty which is mandatory in all usury recoveries against national banks.

Against this factual background, the Court will proceed to a discussion of the reasons which have influenced the Court's decision to reject the use of the class action device under Rule 23 in this case.

Under Rule 23, the Court must first determine whether the prerequisites of subpart (a) have been met and additionally whether at least one of the three provisions of subpart (b) is applicable. In reaching a conclusion, the Court adopted a pragmatic approach in an earnest effort to balance the spirit of the Rule with fundamental rights and traditional notions of fair play and equal justice for all alike.

The burden of proof and of persuasion rests throughout upon the plaintiff who seeks to represent a class of numerous individuals. *Poindexter* v. *Teubert,* 462 F.2d 1096 (CA4, 1972); *Rossin* v. *Southern Union Gas Co.,* 472 F.2d 707 (CA10, 1973). The broad terms of Rule 23 have been recognized as calling for the exercise of some considerable discretion of a pragmatic nature. *Ratner* v. *Chemical Bank New York Trust Co.,* 54 F.R.D. 412 (S.D. N.Y. 1972). See also: *Shumate & Co.* v. *National Assn. of Securities Dealers,* 509 F.2d 147 (CA5, 1975).

Speaking for the Court in *Eisen* III (*Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (CA2, 1973)), Judge Medina observed that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree" and the blame is placed in part upon the "erroneous and frustrating view" that some way "must" be found to entertain the case as a class action. There is no compulsion written into Rule 23.

On the contrary, the compulsion is to search the facts of each case to determine whether justice to all and the efficient administration of justice will best be served by the use of such a device in the circumstances of the particular case at hand.

In this connection, it is not irrelevant to consider who is to benefit and who is to suffer and how and to what extent.

Another consideration is the effect of the class action device on the defendant who finds himself suddenly confronted with thousands of lawsuits, all built into one, and who is faced with claims for damages and penalties reaching astronomical amounts, in this case $14,000,000.00, of which one-half is a statutory penalty,—enough to seriously endanger if not to destroy the very solvency of the bank. The threat implicit in this situation has been referred to as "legalized blackmail." *Eisen* III, 479 F.2d at 1019.

Other courts have placed emphasis upon the undesirable "horrendous penalty" that can be generated by the pursuit of class actions to recover damages and penalties. Cf. *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D. N.Y.) 1972); *Rogers* v. *Coburn Finance Corp.*, 54 F.R.D. 417 (N.D. Ga. 1972); *Gerlach* v. *Allstate Ins. Co.*, 338 F.Supp. 642 (S.D. Fla. 1972). When suffering on one side is intense and the benefit on the other is minimal, if any, the Court must proceed with due caution to avoid an injustice, especially when it appears, as here, that each individual who may have an interest is free and able to pursue his own remedy.

In sum, the allowance of class action status in this case will threaten the defendant with a horrendous penalty, and will benefit individual customers little, if at all. On the other hand, to deny the motion will harm no one who sincerely desires to prosecute a claim against the bank, because the statute of limitations has been suspended (*American Pipe and Const. Co.* v. *Utah*), 94 S.Ct. 756, 414 U.S. 538 (1974)), and everyone has a forum available for prosecution of his claim in the traditional manner.

This brings the Court to the question of whether the case is manageable as a class action and the related question of whether common questions predominate.

One directive of Rule 23 is that the Court evaluate "the difficulties likely to be encountered in the management of a class action." Commenting upon the quoted directive the Supreme Court in its review of *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974)) said:

> ". . . Commonly referred to as 'manageability,' this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. . . ." (94 S.Ct. at 2146, 417 U.S. at 164).

The *Eisen* cases, both *Eisen* II and *Eisen* III, include one admonition which deserves threshold emphasis. Judge Lumbard, in his dissenting opinion in *Eisen* II (*Eisen* v. *Carlisle and Jacquelin*, 391 F.2d 555 (CA2 1968)), observed:

> ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . . ." (391 F.2d at 572).

The majority in its opinion in *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 479 F.2d 1005 (CA2 1973)) sounded the same note with the observation:

> ". . . Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. . . ." (479 F.2d at 1008).

In its review of *Eisen* III, the Supreme Court of the United States indicated no disagreement whatever with the stated truism. Moreover, this series of decisions, including that of the Supreme Court of the United States, makes it clear that in making the determination of the lack of manageability and superiority and of other necessary prerequisites to the class action approach, the so-called "class" does not ever become a legal entity or a litigant apart from the individual members of the class.

In short, even if the present action wears the cloak of a class action, the individuals composing the class still must be dealt with as individuals and each individual's case must stand or fall upon its own merits.

As a predicate for developing the testimony of the witness offered by plaintiff as a computer expert, the plaintiff's ultimate contention or theory of the case was stated into the record as follows:

> ". . . The contention is that the only relevant factors in computing the refund are the amount of service charges or finance charges billed during the suit period and the amount paid during the suit period." (Copeland dep., p. 46).

Looking solely to these factors asserted as the "only relevant factors," plaintiff would limit the case in its first stage to a computation of the dollars paid by *all* credit card customers in response to service charges for the suit period (initially 24 months but expanded by supplement to complaint to four years). The total of all service charges for all accounts for the four year period, fairly estimated at $7,000,000.00, would then be multiplied by two to create a $14,000,000.00 "fund" which which the bank would be expected to pay into Court or disburse as directed, after, of course deducting attorneys' fees to plaintiff's counsel

and other expenses incurred in administration of the case. In phase two, a calculation of dollars paid during the suit period by each customer is contemplated and the amount, after deducting attorneys' fees and expenses, prorated in some fashion not explained, would then be automatically disbursed. All of this, according to the plaintiff, is to be done by devising new programs for the bank's computers.

One trouble with the plaintiff's approach thus far is that there is and can be no cause of action for recovery of interest *charged* but only for recovery of interest *paid*. In order to amount to actionable usury, the dollars paid must convert into an *effective* percentage *rate* which exceeds the maximum per annum percentage rate found to be allowed by the law. In this case, the dollar amount charged or paid may or may not convert into an effective percentage rate in excess of the rate found to be allowed by law, depending upon the rate charges in relation to the time the transactional credit is used by the borrower or customer.

The alternative is to examine and reconstruct each card holder account, which cannot be done without examining each transaction from the microfilm records and either producing copies of each document involved or key-punching the detailed information therefrom into a re-programmed computer system, the cost and time for which varies from several hundred thousand to several million dollars.

This case is different from one where liability can be shown as to all class members, with only the amount of damages to be determined as to each. *Shumate & Co. v. Nat. Assn. of Security Dealers,* 509 F.2d 147 (CA5, 1975).

This Court rejects plaintiff's contrary premise and finds as a fact that each account would have to be recon-

structed and individually examined in order to determine liability on the charge of usury as well as the amount in case liability were found to exist. In other words, the Court would be faced with some 90,000 separate cases for trial, possibly by jury, on issues first of liability and then on damages, and there is no way that the defendant may be computerized into mass liability or mass damages in the circumstances of this case. In addition, there are some 11,000 delinquent accounts involved, which would or could become counterclaims and require adjudication. Issues of fact affecting only individual members of the class clearly predominate.

The possibility that the defendant, faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions is not a result to be either forced or applauded by this Court. Nor is the Court called upon to run the substantial risk of another *Eisen* "Frankenstein monster posing as a class action." (*Eisen* II, 391 F.2d at 572; *Eisen* III, 94 S.Ct. at 2148, 417 U.S. at 169).

Since the plaintiffs seek to represent a class of individuals who are strangers and who have no voice in the selection of a class champion, the Court is obliged to look closely to the ability of the plaintiffs to adequately represent the class. It is not enough that competent lawyers have committed themselves to the legal representation, although the existence of competent counsel is certainly a prerequisite to adequate representation. In the instant case, the Court is concerned that the stake of the nominal plaintiffs is small and there is no showing that they are either willing or able to finance the litigation as a class action. At the very least, a large sum must be committed

at the front end of a class action approach to provide the notice to the class members which due process requires. *Eisen* v. *Carlisle & Jacquelin,* 94 S.Ct. 2140, 417 U.S. 156 (1974). The postage alone on 90,000 notices would equal $9,000.00 and the cost of labor and supplies would be quite substantial, and this is only the beginning of economic problems which would plague the case as a class action requiring reconstruction in some form of 90,000 odd accounts over a four year period.

At a conference with the Court, the lawyers for the nominal plaintiffs indicated a willingness to advance the cost of the notice and look to their clients for repayment if the case were lost, but to expect the Court to assume that the nominal plaintiff, with very little involved, would be willing or expected to discharge the client's liability to reimburse the attorneys is too much. This may be to prefer rich representatives to poor ones, but in this type of case there is no compulsion that there be a representative at all and if there is to be one, he must have the ability, economic and otherwise, to serve in his self-appointed position. Cf. *P.D.Q. Inc. of Miami* v. *Nissan Motor Corporation In U.S.A.*, 61 F.R.D. 372 (S.D. Fla. 1973), and *Sayre* v. *Abraham Lincoln Federal Savings & Loan Assn.*, 65 F.R.D. 379 (E.D. Pa. 1974).

Finally, the Court must determine whether the procedural device, if applied in the circumstances of this case, would do violence to the substantive law made applicable to claims for the penalty of usury by state statutes and decisions, because Rule 23, like the other federal rules of civil procedure, may not abridge, enlarge or modify any substantive right. 28 U.S.C. §2072. As pointed out in *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1014 (CA2 1973):

". . . Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" (28 U.S.C §2072).

Generally, the receipt of interest for the loan of credit is not inherently evil. The common law did not condemn the practice or limit the amount. 55 *Am. Jur.* 324; §3. Usury laws derived from the efforts of local lawmakers to strike a balance of fairness to lenders and borrowers alike, having due regard to the economic necessities in the particular locality involved. The right of the states to legislate and formulate public policy in this area cannot be disputed and the right to legislate and determine policy includes the incidental right to condition or limit enforcement of enacted usury laws expressly and by a judicial policy determination.

If Mississippi has an ascertainable policy for determining what is or is not a "fair" method for adjudicating the extent of the accountability of lenders who are alleged to have received excessive interest under state law, then that policy cannot be ignored either as substantive law or as bearing upon the question of whether a Rule 23 aggregation against the lender is superior for the required "fair" adjudication of the controversy.[1]

1. An overwhelming number of courts have ruled against requested spurious class action treatment of Truth-in-Lending actions. See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (CA3), *cert. den.* 419 U.S. 885 (1974). One reason is that the policy underlying the law is inconsistent with an aggregation of claims to produce excessive penalties. Analogizing, this Court perceives no good reason why like respect should not be accorded to state policy where state laws are invoked as a basis for recovery.

The Court concludes that under the substantive law of Mississippi, claims for usury are currently viewed as actions for a penalty and are strictly personal to the borrower and that the action may not be maintained by anyone except the borrower or his legal representative in the traditional sense and that the claim is not subject to assignment to another for collection or otherwise. Specifically, Mississippi law denounces the aggregation of individual usury claims as a *"legal fraud"* upon, and therefore as being *unfair* to the lender.

The aggregation of usury claims is against public policy in Mississippi and is stoutly condemned by its case law.[2] A leading case is *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561, 134 A.L.R. 1330 (1941).

In this case the plaintiff, Fry, was a customer of and borrower from the defendant Layton, who was in the small loan business. He filed a suit seeking recovery for usury paid on his own loan and for that paid by eighteen other customers similarly situated who had assigned their claim to him. The Court held that Fry could not recover usury paid as assignee of others similarly situated. This was not grounded on procedure but upon the substantive policy and law of Mississippi as it relates to usury actions. The Court said:

"As was said by this Court in Byrd et al v. Newcomb Mill & Lbr. Co., 118 Miss. 179, 79 So. 100, 101: 'The statute protects and safeguards the borrower by penalizing sharply the lender in the usurious contract; but it was not meant to give to the borrower any unjust advantage of the lender. Its good purpose

2. There is a sharp conflict of authority on the question of whether an action for usury is exclusively personal and nonassignable, but Mississippi takes a positive stand on the point. See Anno. 82 A.L.R. 1008 and 134 A.L.R. 1335.

should not be perverted into a source of legal fraud by borrowers upon lenders.' "

The Court concluded:

"We hold that appellee, as assignee, cannot recover on these claims, but since he appears to have been the borrower upon two of them, the case is reversed and remanded." (2 So.2d at 565).

See also: *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (1974), citing and following *Fry* v. *Layton, supra,* wherein the Court said:

"This Court has held that the forfeiture provisions of the usury laws are highly penal in nature and must be strictly construed. (Citing cases)." (300 So.2d at 456).

There is nothing contra in the National Banking Act. The federal law fixes no interest rate limits apart from local law and condemns no usury apart from state law. The federal statutes reach only to the point of assuring that national banks are not treated less favorably than state banks or other competitive lenders in the interest charge area and of limiting the penalty for violating state usury laws, in any event, to double the amount of interest actually paid. Indeed, like Mississippi, the National Banking Act expressly limits the right to sue for usury to "the person by whom it has been paid or his legal representative," 12 U.S.C. 86, again leaving to state law the question of who is a "legal representative" who may maintain such an action. See *Louisville Trust Co.* v. *Kentucky National Bank,* 87 Fed. 143 (D. Ky. 1898), and cases annotated to 28 U.S.C. §86. State laws differ as to the definition of a "legal representative", but Mississippi happens to limit the term to exclude even voluntary assignees of borrowers,

to the ultimate substantive end that the lender may not be faced in any case with an aggregation of claims for the usury penalty in the hands of a stranger to the individual loan transactions, such being viewed as a "legal fraud". *Fry* v. *Layton, supra, and Liddell* v. *Litton Systems, Inc., supra.* There is no indication of a Congressional interest to encourage litigation in this area or to override state policy.

Since the Mississippi statute law alone determines the matters of both interest and the existence of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.[3]

Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national

---

3. Attempted federal court actions against state banks or other lenders would fail in most cases for lack of the minimum jurisdictional amount, if not for lack of diversity. Cf. *Snyder* v. *Harris,* 394 U.S. 332, 89 S.Ct. 1053 (1969). If the federal court should allow aggregation of claims for usury against national banks, viewed by Mississippi as a "legal fraud" and non-maintainable under its usury laws, the result would be to allow the perpetration of legal frauds by local standards upon national banks but not upon state banks or local lenders, since these could not be reached by the Rule 23 procedural device. Cf. *Union National Bank* v. *Louisville N.A. & C. Ry. Co.*, 163 U.S. 325, 16 S.Ct. 1039 (1896); *Daggs* v. *Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732 (1900). On the point that local law determines who may maintain an action for usury, to the end that equal treatment may be had by all, see *Meadow Brook National Bank* v. *Recile,* 302 F.Supp. 62 (E.D. La. 1969); *Municipal Leasing Systems* v. *Northampton National Bank of Easton,* 382 F.Supp. 968 (E.D. Pa. 1974).

bank was superior for the "fair" adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a "legal fraud" by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud.

Turning, finally, in partial summary, to the specifics of Rule 23, the Court finds that the numerosity, commonality and typicality requirements of subpart (a) are present but that the plaintiffs cannot fairly and adequately protect the interests of the class, because they are neither able nor willing to finance the case as a class action.

Subparts (b)(1) and (2) are inapplicable. See *Goldman* v. *The First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenny* v. *Landis Financial Group, Inc.*, 349 F.Supp. 939 (N.D. Iowa, 1972); *Eisen* III, 479 F.2d 1005 (CA 2 1973); *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974), footnote 4.

Subpart (b)(3) conditions have not been met. The proof fails to show that questions of law or fact common to members of the class predominate over questions affecting only individual members. While there are some questions common to all, each individual case presents its own questions of fact and its own problems on issues of both liability and damages. By pragmatic standards, the case is unmanageable as a class action.

A class action is not superior to other available methods for the *fair* and *efficient* adjudication of the controversy, especially in view of (1) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (2) the substantive law and policy of the state which views the aggregation of usury claims as a

"legal fraud" and unfair to the lender; (3) the invidious banks in the enforcement of usury laws contrary to the discrimination which would be imposed upon national intent of the National Banking Act; (4) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys and (5) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

The motion for an order that this case proceed as a class action is denied. The cause will proceed upon the individual complaints as in other cases.

We are of the opinion that this Opinion and the Order which will be entered pursuant hereto involve a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate determination of the litigation. The order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C. §1292 and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of this Opinion and Order to be entered pursuant hereto.

This 27th day of September, 1975 at Biloxi, Mississippi.

/s/ Walter L. Nixon, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

ORDER OVERRULING MOTION AND DENYING CLASS ACTION STATUS

(Filed October 15, 1975)

Came on to be heard the motion of the plaintiff and intervening plaintiff for an order allowing this action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the Court having heard and considered the said motion on the evidence, both oral and documentary, and having considered the briefs and arguments of counsel and finding that this action should not be allowed to proceed as a class action for the reasons set forth in the Memorandum Opinion dated September 27, 1975 as filed in this cause, which said Memorandum Opinion is incorporated herein by reference but that this order should be certified for possible appeal under 28 U.S.C., Section 1292:

IT IS ORDERED AND ADJUDGED that the motion of the plaintiff and intervening plaintiff that this case proceed as a class action be and it is hereby denied, and this cause shall proceed in all respects upon the individual complaints as in other cases, subject to a temporary stay of proceedings as ordered below.

This Court being of the opinion that the decision denying class action status in this case as evidenced by the Memorandum Opinion dated September 27, 1975, and as further evidenced by this order, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal

to the Court of Appeals for the Fifth Circuit may materially advance the ultimate determination of the litigation;

IT IS FURTHER ORDERED that the order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C., Section 1292, and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of the said opinion and order.

SO ORDERED on this the 14th day of Otcober, 1975.

/s/ Walter L. Nixon, Jr.
United States District Judge

Approved As to Form Only:
W. Roberts Wilson, Jr.
Toxey Hall Smith, Jr.
Robert S. Vance
Frederick G. Helmsing

By: /s/ Frederick G. Helmsing
/s/ Vardaman S. Dunn

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-8416

ROBERT L. ROPER, and JACK HUDGINS, on Behalf of Themselves and all others Similarly Situated,
Petitioners,

versus

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, Jackson, Mississippi, and DEPOSIT GUARANTY NATIONAL BANK, Jackson, Mississippi, a Body Corporate,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

(Filed December 8, 1975)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Southern District of Mississippi entered on October 14, 1975, is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION No. 4261(N)

ROBERT L. ROPER AND JACK HUDGINS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

vs.

CONSURVE, INC., D/B/A BANKAMERICARD CENTER, JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,
Defendants.

OFFER OF DEFENDANTS TO ENTER JUDGMENT AS BY CONSENT AND WITHOUT WAIVER OF DEFENSES OR ADMISSION OF LIABILITY

(Filed June 1, 1976)

Now come the defendants, subsequent to the order of this Court declining to allow this action to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure, and would show and represent the following:

1.

Plaintiffs have filed in this cause a motion for summary judgment on the original amended complaint filed February 28, 1972, and on the supplemental complaint filed January 15, 1974, but plaintiffs have represented to the Court in writing that, "The named plaintiffs will dismiss the Truth-in-Lending issue in this cause," and that a formal motion to dismiss would be presented prior to the hearing

on the summary judgment set for June 9, 1976. A copy of the written notice is attached as Exhibit A.

2.

The amended complaint filed February 28, 1972 contains a demand for judgment which, as applied to the individual plaintiffs, is as follows:

> "1. . . . such . . . sum as represents the aggregate of the following (a) Twice the amount of interest paid within two years next preceding the filing of this complaint . . . and (b) such additional interest as has been charged . . . but not paid . . . within two years next preceding the filing of this complaint.
>
> "2. Any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be deemed appropriate by the Court.
>
> "3. Cost of this action. . . ."

3.

The supplemental complaint filed January 15, 1974 demands judgment as follows:

> "WHEREFORE, PREMISES CONSIDERED, Plaintiffs sue and demand judgment on behalf of themselves . . . in the same manner, style and fashion as sought in the original complaint and amended complaints for a supplemental period including the period from the date of the filing of the original lawsuit down to the date of the filing hereof, and Plaintiffs sue and demand damages for themselves . . . in double the amount of interest exacted from them . . . from the time of the filing of the original lawsuit down to, until and including the date of the filing of this supplemental complaint, and Plaintiffs pray on behalf of themselves . . . that the interest charged but not yet collected be forfeited. . . ."

4.

The period covered by the original complaint as amended and the supplemental complaint sometimes referred to as the "suit period" is the period September 18, 1969 through January 15, 1974.

5.

Neither the complaint, as amended, nor the supplemental complaint nor the motion for summary judgment reduces plaintiffs' demand to a specific dollar amount, but instead, the complaint seeks recovery of a sum which represents twice the amount of interest paid by plaintiffs and forfeiture of such additional interest as has been charged to plaintiffs but not paid plus the cost of this action and any other remedies and relief afforded by the laws of the United States or the State of Mississippi which may be determined appropriate by the Court.

6.

Without admitting any liability and expressly denying the same, defendants do hereby offer to enter judgment, as by consent, to provide that defendants shall pay to each of the plaintiffs, Robert L. Roper and Jack Hudgins, and said individual plainitffs do have and recover the amount equal to the sum demanded, as aforesaid, in the original complaint as amended and in the supplemental complaint, being a sum equal to double the service charges made during the entire suit period and paid by each of the said named plaintiffs plus a sum equal to the forfeiture of service charges made during the entire suit period but

unpaid plus interest as provided by the laws of the State of Mississippi applicable to plaintiffs' demands and all costs of this action and consequent to such offer, defendants do hereby waive their right to litigate with said plaintiffs the issues of liability to each of them to the extent of the judgment hereby offered to be entered, all without prejudice to or waiver of defendants' right to deny liability for and to litigate issues involving any claims or complaints of any other persons or any other plaintiffs.

7.

This offer is made for the purpose only of avoiding further expense and loss of time to the parties in the prosecution and defense of the individual complaints of the named plaintiffs and without admitting any legal obligations or liabilities whatsoever.

8.

Attached hereto as Exhibit B is a suggested form of interlocutory order and a suggested form of a final judgment which are tendered to the Court for entry pursuant to this offer of judgment.

Respectfully submitted,

Consurve, Inc., D/B/A BankAmericard Center, Jackson, Mississippi, and Deposit Guaranty National Bank, Jackson, Mississippi

By: /s/ Vardaman S. Dunn
Attorney of Record

Of Counsel:
Cox & Dunn, Ltd.
Post Office Box 1046
Jackson, Mississippi 39205

(Certificate of Service Omitted in Printing)

Exhibit A

TOXEY HALL SMITH, JR.
Lawyer
P. O. Drawer 8 Phone 601—928-3222
Wiggins, Mississippi 39577
P. O. Box 836 Phone 601—875-3212
Ocean Springs, Mississippi 39564

May 13, 1976

Mr. James Dukes
Federal Court Law Clerk
Federal Courthouse
Biloxi, Mississippi 39533

Re: Roper vs. Consurve

Dear Jimmy:

This will confirm my telephone call of yesterday to the effect that the named plaintiffs will dismiss the Truth in Lending issue in this cause. I have communicated this information directly to opposing counsel, Vardaman S. Dunn, so he will be aware of our position.

I was reluctant to do this because of the class action aspects of the case. However, I feel that we have the power to do so, without criticism, on behalf of the named plaintiffs and, since this is not a class action at this time it would not be binding upon the class if later certified on appeal or remand.

If the judge desires, I will submit a formal motion to dismiss prior to the hearing on the summary judgment set for June 9, 1976.

Very truly yours,

/s/ Toxey Hall Smith, Jr.
Toxey Hall Smith, Jr.

THSjr: pa
cc: Hon. Vardaman S. Dunn
P. O. Box 1046
Jackson, Mississippi 39205

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

ORDER OF DISMISSAL WITH PREJUDICE OF TRUTH-IN-LENDING COUNT

(Filed June 9, 1976)

There coming on for hearing the motion ore tenus by the named plaintiffs to dismiss, with prejudice, the second count of the Complaint relating to the Federal Truth-in-Lending Act and the Court being fully advised in the premises finds said motion should be, and hereby is, sustained.

It is, therefore, ordered and adjudged that the second count of the plaintiff's Complaint, as last amended, relating to the Federal Truth-in-Lending Act is dismissed with prejudice.

ORDERED AND ADJUDGED this the 9th day of June, 1976.

/s/ Walter L. Nixon, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

INTERLOCUTORY ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER TO ENTER JUDGMENT AS BY CONSENT

(Filed June 9, 1976)

Came on this day to be heard the motion of plaintiffs for summary judgment and the offer of defendants to enter judgment in favor of the plaintiffs, Robert L. Roper and Jack Hudgins, for the amounts demanded in the original complaint, as amended, and in the supplemental complaint (except for the amount demanded in the plaintiffs' alleged "second cause of action" based on an alleged violation of the Federal Truth-in-Lending Act which said second cause of action has been dismissed on plaintiffs' motion), and the Court finding that judgment should be entered in favor of each of the said named plaintiffs for the amounts demanded as offered by defendants, to-wit: For a sum equal to double the service charges made by defendants against each of the said plaintiffs during the entire suit period (September 18, 1969 through January 15, 1974) and paid by each of said named plaintiffs plus a sum equal to the forfeiture of all service charges made during said suit period but unpaid by the plaintiff against whom said charges were made plus interest at the rate of 6% per annum from the respective dates that charges were made or made and paid, as the case may be, plus the plaintiffs' costs of Court, with said judgment to bear interest in turn from its date of entry until paid at the rate allowed by the laws of the State of Mississippi.

IT IS FURTHER ORDERED that plaintiffs prepare and submit to the Court a calculation of the amount for which judgment is to be entered pursuant to the above formula, whereupon final judgment will be entered in favor of the plaintiffs as offered by defendants, said judgment to be without advantage or prejudice to either party on any issues or questions of liability in any further action or proceeding by or in behalf of the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

IT IS FURTHER ORDERED that plaintiffs submit said calculation of the amount for which judgment is to be entered within 14 days from the date of this order.

SO ORDERED on this the 9th day of June, 1976.

/s/ Walter L. Nixon, Jr.
United States District Judge

Approved As to Form Only:

/s/ (Illegible)
Attorney for Plaintiffs

/s/ Vardaman S. Dunn
Attorney for Defendants

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

PLAINTIFFS' CALCULATION OF DAMAGES

(Filed June 30, 1976)

NOW COME the Plaintiffs in the above styled and numbered cause, by and through undersigned counsel, and submit the following calculation of damages and interest pursuant to the Court's Interlocutory Order of June 9, 1976, and with respect show the Court as follows, to wit:

I

Plaintiff Robert L. Roper's damages are in the sum of SIX HUNDRED EIGHTY-THREE AND 30/100 ($683.-30) DOLLARS, plus interest of TWO HUNDRED SIX AND 12/100 ($206.12) DOLLARS.

II

Plaintiff Jack Hudgins' damages are in the sum of THREE HUNDRED TWENTY-TWO AND 70/100 ($322.-70) DOLLARS, plus interest of ONE HUNDRED AND 84/100 ($100.84) DOLLARS.

Respectfully Submitted,

Robert L. Roper and Jack Hudgins
By: /s/ Wm. Roberts Wilson, Jr.
Of counsel for Plaintiffs

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT

(Filed July 15, 1976)

Came on for approval the calculation of the amount for which judgment is to be entered as presented by plaintiffs and pursuant to the interlocutory order heretofore entered in this cause, and the Court finding that plaintiffs' calculation is correct and in conformity with the directions of said interlocutory order and that judgment should be entered accordingly in favor of each plaintiff pursuant to the offer of judgment as made by defendants;

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That the plaintiff, Robert L. Roper, do have and recover of and from defendants the principal sum of $683.30 plus legal interest in the sum of $200.12, making a total of $889.42 for which judgment is rendered.

2. That the plaintiff, Jack Hudgins, do have and recover of and from defendants the principal sum of $322.70 plus legal interest in the sum of $100.84, making a total of $423.54 for which judgment is rendered.

3. That the judgment in favor of each of the plaintiffs bear interest at the rate of 8% per annum from its date until paid and that each of the plaintiffs do have and recover their costs of Court to be taxed by the Clerk.

This judgment is entered pursuant to the offer of judgment as made by defendants for the amount demanded by the named plaintiffs in the original complaint, as amended, and in the supplemental complaint as calculated by plaintiffs pursuant to the interlocutory order heretofere entered and is entered without waiver on the part of defendants of any defenses and without admission by the defendants of any liability to the named plaintiffs or others and is without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

The defendants may discharge their liability hereunder by depositing the sum awarded herein with the Clerk of the Court, pursuant to Rule 67 of the Federal Rules of Civil Procedure and may take the Clerk's receipt therefor, and the Clerk thereupon shall forthwith remit the amounts adjudged to the respective parties on their request.

SO ORDERED AND ADJUDGED on this the 15 day of July, 1976.

/s/ Walter L. Nixon, Jr.
United States District Judge

Approved as to Form Only

/s/ Frederick G. Helmsing

/s/ Vardaman S. Dunn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

CLERK'S RECEIPT FOR DEPOSIT

(Filed July 15, 1976)

The undersigned Clerk in and for the jurisdiction aforesaid does hereby acknowledge receipt of the sum of $889.42 for payment of judgment of Robert L. Roper and the sum of $423.54 for payment of judgment of Jack Hudgins, pursuant to authorization as contained in the "FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT" dated and entered on the 15th day of July, 1976.

DATED this 15th day of July, 1976.

Harvey G. Henderson, Clerk
United States District Court
By /s/ I. Henley, D.C.

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL

(Filed August 10, 1976)

TAKE NOTICE that ROBERT L. ROPER and JACK HUDGINS, on behalf of all others similarly situated to themselves and on whose behalf the named Plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders.

/s/ W. Roberts Wilson, Jr.
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 76-3600

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF ALL OTHER SIMILARLY SITUATED,
Plaintiffs-Appellants,

vs.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,
Defendants-Appellees.

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION

Now come the appellees, (collectively called "Bank"), and respectfully move the Court for an order dismissing the Notice of Appeal and for cause, would show the following:

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certification of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The following supporting papers are attached as an Addendum to this Motion: (reference to papers omitted)

Respectfully submitted,

/s/ Vardaman S. Dunn
Attorney for Appellees

(Certificate of Service Omitted in Printing)

Robert L. ROPER et al.,
Plaintiffs-Appellants,

v.

CONSURVE, INC., d/b/a BankAmericard Center and Deposit Guaranty National Bank, Jackson, Mississippi,
Defendants-Appellees.

No. 76-3600.

United States Court of Appeals,
Fifth Circuit.

Aug. 24, 1978.

Credit card holders brought class action against national bank on behalf of all other Mississippi holders of credit cards issued by bank, alleging that charges made were usurious under Mississippi law. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., denied certification following evi-

dentiary hearing and, after bank tendered two class representatives payment in full of amount each individually claimed, entered judgment on behalf of plaintiffs, and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) despite bank's offer to pay off named plaintiffs, named plaintiffs were not precluded from appealing denial of class certification; (2) class representation was adequate, and (3) class action was superior method of proceeding.

Reversed and remanded.

Thornberry, Circuit Judge, specially concurred and filed opinion.

1. Federal Civil Procedure (Key) 1698

Where there is determination that class is not maintainable, notice requirements of class action rule's dismissal or compromise provision do not apply, at least where dismissal and settlement of action do not directly adversely affect rights of individuals not before court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

2. Federal Civil Procedure (Key) 1696

By very act of filing class action, class representatives assume responsibilities to members of class, and they may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

3. Federal Courts (Key) 544

Defendant's satisfaction of representative plaintiffs' claims could not preclude them from appealing denial of class certification nor did it excuse them from their duty of doing so absent express approval by trial court. Fed. Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

4. Federal Courts (Key) 544

Member of putative class may appeal denial of certification, even though it has been decided that claims of named plaintiff lack merit. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

5. Federal Courts (Key) 544

An individual plaintiff who has already prevailed in trial court may appeal denial of class certification. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

6. Federal Courts (Key) 544

Individual plaintiff who loses on merits may appeal denial of class certification. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

7. Federal Civil Procedure (Key) 164

Even if named plaintiffs in class action had been satisfied with offer of judgment and had not objected, named plaintiffs continued to maintain stake in procuring class-wide relief. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure (Key) 164

Where only major cost to be advanced before it could be determined whether defendant was liable was that of class notice, where postage for such notice, if individual mailing was required, would have been about $15,000, where counsel offered to advance that sum looking to named plaintiffs for repayment if required, where named plaintiffs offered note and mortgage on realty as security, and where named plaintiffs' counsel also offered to give bond to guarantee that notice costs would be met, named plaintiffs adequately established their ability to finance litigation for purposes of class certification. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

9. Federal Civil Procedure (Key) 164

Neither satisfaction nor denial of individual plaintiffs' claims, if effective, necessarily precluded their serving as adequate representative of class. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 182.5

Where credit card holders brought class action against national bank on behalf of 90,000 Mississippi residents who held credit cards issued by bank alleging that charges made were usurious under Mississippi law, where claims were relatively small, averaging less than $100 each, where question of law involved applied alike to all, where individual fact determinations could be reached by using objective criteria and assistance of computer, and where potential class members could not effectively secure relief by another type of action, and where proposed class was peculiarly manageable plaintiffs were entitled to certification of class. Fed.Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 182.5

In class action brought by credit card holders against national bank on behalf of all other Mississippi holders of credit cards issued by bank in which plaintiffs alleged that charges made were usurious under Mississippi law, common questions predominated for purposes of satisfying class action rule, and issues unique to each claim were not so complex as to make costs of determination prohibitive or to require individual evidentiary hearings. Fed. Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

12. Federal Civil Procedure (Key) 161

Class action rule was designed to prevent problem of wasteful and uneconomical multiple individual actions, Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

13. Federal Civil Procedure (Key) 161

Because considering financial impact of judgment in determining whether to certify class, presupposes success on the merits and requires trial court to express an opinion on harshness vel non of particular remedy prior to trial itself, it ought to be allowed only in extreme cases. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

14. Federal Civil Procedure (Key) 182.5

Attitude of Mississippi law disfavoring usury suits did not preclude bringing of suit by credit card holders against national bank as class action since action was regulated by federal law and since state law, even if relevant, would yield to federal class action rule. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

15. Usury (Key) 82

Under Mississippi law usury claims are penal and are viewed as personal to borrower; aggregation of such claims is condemned.

16. Banks and Banking (Key) 270(1)

National Bank Act adopts usury laws of states only insofar as they severally fix rates of interest; sole particular in which national banks are placed on an equality with natural persons is as to rate of interest, and not as to character of contracts they are authorized to make. National Bank Act, 12 U.S.C.A. §§ 85, 86.

17. Banks and Banking (Key) 270(1)

Provisions of National Bank Act looking to local law as surrogate federal law for determining permissible interest charges were designed by Congress to place national banks on plane of competitive equality with other lenders in respective states. National Bank Act, 12 U.S.C. §§ 85, 86.

18. Federal Civil Procedure (Key) 182.5

Difficulties in management of class action suit brought by credit card holders against national bank did not preclude bringing of suit as class action, where all members of proposed class lived in one state, where defendant had each member's address on computer, where itemized history of each account could readily be obtained, and where substantial costs would be involved only if bank was found to be liable on plaintiffs' usury claims. Fed.Rules Civ.Proc. rule 23(d)(3), 28 U.S.C.A.

19. Federal Civil Procedure (Key) 182.5

Possible assertion of counterclaims by national bank in class action brought against it by credit card holders did not preclude bringing of suit as class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WISDOM, THORNBERRY, and RUBIN, Circuit Judges.

RUBIN, Circuit Judge:

This case presents two class action questions: whether the class action claim and, indeed, the entire controversy became moot when, after the trial court denied certification following an evidentiary hearing, the defendant bank tendered to the two class representatives payment in full of the amount each individually claimed and judgment was entered on their behalf; and, if not, whether a class action is superior to other available means for the fair and efficient adjudication of a claim for usurious charges on behalf of a class potentially comprising 90,000 holders of credit cards issued by a national bank. Having concluded that the defendants cannot moot the class claim

by attempting to pay off the class representatives, we decide also that a class action is not only superior to other methods but singularly appropriate for the adjudication of this controversy, and, therefore, remand the case for further proceedings.

I.

Facts

Two holders of credit cards issued on the "BankAmericard" plan sued the national bank that had issued the cards under the National Bank Act, 12 U.S.C. §§ 85 and 86, contending that the charges made were usurious[1] on behalf of themselves and all other Mississippi holders of the same cards issued by the defendant.[2] Under the plan, card holders can buy merchandise or services from third persons who have contracts with the bank or other member banks, and charge their purchases. The merchants then sell the credit instruments to the bank at a discount. The bank bills the card holder; if the payment is not made within a certain time, it charges interest on the unpaid balance. During the suit period, there were 90,000 to 100,000 individual card holders.

The trial court declined to certify the action as a class action. The bank then made an offer of judgment to each of the two individual plaintiffs, without admitting liability, and tendered to each the maximum amount that each could have recovered ($889.42 and $423.54, respectively) by depositing this sum in the registry of the court. The two named plaintiffs have never accepted the tender,

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1. The complaint alleges the rates exceeded those permitted by Section 36, Chapter 2 of the Mississippi Code (1942) as amended. *See* Title 75, ch. 17 §§ 1, 17, Mississippi Code (1974).

2. The original complaint also charged a violation of the Truth-in-Lending Statute, 15 U.S.C. § 1640, *et seq.*, but that claim has been dropped.

but judgment based on defendant's offer of judgment was entered over plaintiffs' objection.

The credit card system, as the experienced trial judge correctly stated, is made possible by the use of computers. The computer charges each transaction to the card holder's account. If the credit instrument is placed by the merchant with some other bank, it is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred to the transmitting bank.

For the bank's convenience, the accounts are divided into ten separate groups, called cycles. The credit card accounts are posted on ten days a month; the charges for holders whose names are in each cycle are posted in one day. The computer is programmed so that, on the billing date, it adds charges, subtracts, credits, adds any finance charge due under the BankAmericard plan and prepares a statement reflecting each transaction. The statement is then mailed to the customer.

The data in the computer is stored on magnetic tapes. These are updated from period to period. Transaction data is not retained permanently on the tapes, however. It is printed (on "printouts"), and the printouts are retained. A microfilm record is made of all charge tickets, credit transactions and statements.

During the period in question, the bank made a monthly service charge of 1½% on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill 1½% of the unpaid portion of the prior bill, which was shown as the new balance. This is the charge contended to be usurious. Thus, if a customer bought merchandise

and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days, and would then have 30 more days within which to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments; in that case, the service charge was made only on unpaid installments.)

About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always 1 1/2% on the unpaid balance; if the effective rate were computed based on the number of days from the date the bank received each charge until it was paid, that effective rate would vary for each customer each month. There was evidence that both the finance fees *charged* to each card holder and the fees each *actually paid* during the suit period can be tabulated, although this requires clerical assistance in addition to the use of the computer. The plaintiff's expert witness testified that the total cost of such preparation, including computation of the refund due each class member if the action were successful, would be $45,575.

It is also possible to reconstruct every account in full by again processing the transactions. The plaintiffs' expert estimated the cost of this, if it were required by the court, to be $125,000. He testified that there are contractors available to perform such services. The defendant's expert testified that, if it were necessary to reconstruct every individual account, the cost might range from $367,700 to $3,432,000.

The computer could, of course, easily be used to give notice to members of the class and sort out persons who are not class members (for example, because they opened accounts after the class was certified).

II.

Mootness

[1, 2] The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. One well-publicized danger in the class action is the possibility that it will be used to collect quick, undeserved damages; this type of effort to establish a quick coup has been called a "strike suit." We have held that prior to certification a class action cannot be dismissed merely because the representatives are satisfied, unless there is notice to the putative class of the proposed dismissal and a determination by the court that the dismissal is proper, as required by Rule 23(e) F.R.C.P. *Pearson* v. *Ecological Science Corp.*, 5 Cir. 1975, 522 F.2d 171, 177, *cert. denied sub nom.*, 1976, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762, and cases cited therein. Where, as here, there is a Rule 23(c)(1) determination that the class is not maintainable, the notice requirements of Rule 23(e) do not apply if "dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.

[3-6] Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. *See* generally, Miller, An Overview of Federal Class Actions: Past, Present and Future (Federal Judicial Center, 1977) at 57-63. A member of the putative class may appeal the denial of certification, even though it has been decided that the claims of the named plaintiffs lack merit. *United Airlines, Inc.* v. *McDonald*, 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. An individual plaintiff who has already prevailed in the trial court may appeal the denial of class certification. *Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701-702, and cases cited therein; *Esplin* v. *Hirschi*, 10 Cir. 1968, 402 F.2d 94, *cert. denied*, 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459. An individual plaintiff who loses on the merits may also appeal a denial of certification. *Horn* v. *Associated Wholesale Grocers, Inc.*, 10 Cir. 1977, 555 F.2d 270, 276-277; *Donaldson* v. *Pillsbury Co.*, 8 Cir. 1977, 554 F.2d 825, 831, note 5, *cert. denied*, 1977, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128, and cases cited therein. There is no reason why an individual plaintiff to whom payment of his claim has been tendered should have less standing in the light of the judicial responsibility to ensure that class representatives adequately represent the interests of the class and do not settle either their claims or the class action without court approval.

In *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 10 (slip op. 6531, 6540, note 10), we noted that if the representative's claim became moot prior to appellate review of a denial of certification based upon a full evidentiary hearing, there are several reasons

for permitting the representative to appeal that decision. In particular, unless the representative is permitted to appeal, whether the alleged error in denying certification will be reviewed will depend upon the intervention of a putative class member who, under *Pearson*, is not entitled to notice of the individual compromise and may be unaware that the putative class is without a representative who has a viable claim. Review of alleged judicial error ought not be foreclosed so fortuitously. Additionally, such intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal.

[7] Constitutional requirements are met: a viable controversy still exists with respect to the maintainability determination. The only issue is who may raise it. Here, plaintiffs have a stake because of their objection to the compromise. However, even had they been satisfied with the offer of judgment, the result would not change; the individual plaintiffs would maintain a stake in procuring class-wide relief. *Gelman* v. *Westinghouse Electric Corp., supra.* Moreover, they maintain a nexus with the class and, for reasons detailed subsequently, continue to be adequate representatives for purposes of Rule 23(a)(4) despite the mootness of their claims. *See Satterwhite, supra,* ..... F.2d at ....., note 11 (slip op. at 6541, note 11); *Long* v. *Sapp,* 5 Cir. 1974, 502 F.2d 34, 42. Hence, the issue is properly before us on appeal.

III.

The Class Action

The lower court, after several conferences with counsel and a full study of the evidentiary materials, concluded that, although the numerosity, commonality and typicality

requirements of Rule 23(a)(1), (2) and (3) Fed.R.Civ. Proc. are met, the requirement of Rule 23(a)(4) that the plaintiffs fairly and adequately protect the interests of the class is not satisfied because of the inability of the named plaintiffs to finance the case. It found that the requirements of Rule 23(b)(3)[3] were not met because plaintiffs failed to establish that questions of law and fact common to class members predominate, and because a class action is not superior due to: (1) the availability of the traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims are aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counter-claims are filed. Upon review, we find that the requirements of Rule 23(a)(4) are met, and that the court went beyond the bounds allowed for the exercise of its discretion with respect to the Rule 23(b)(3) determination. *See Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.,* 5 Cir. 1975, 509 F.2d 147, 155, *cert. denied,* 1975, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97.

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3. The court found that the requirements of Rule 23(b)(1) were not met because the prospective class consisted entirely of small claimants who could not afford to litigate their individual actions; hence there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . ." and that Rule 23(b)(2) did not apply because the actions were not predominantly for injunctive or declaratory relief. *See Eisen* v. *Carlisle & Jacquelin,* 1974, 417 U.S. 156, 163, 94 S.Ct. 2140, 2146, note 4, 40 L.Ed.2d 732. It is not necessary for us to review these determinations because of the availability of Rule 23(b)(3) certification. However, we note that the court's finding with respect to Rule 23(b)(1) [that individual actions are unlikely] is inconsistent with its determination that traditional procedures for prosecuting individual actions provide meaningful alternatives to class certification.

A. *Adequacy of Class Representation*

[8] No question is raised about the ability and willingness of the named plaintiffs fairly and adequately to protect the interests of the class, but the defendants do question the plaintiffs' ability to finance the litigation.[4] Their counsel are qualified and experienced. *Eisen* v. *Carlisle & Jacquelin* (*Eisen II*), 2 Cir. 1968, 391 F.2d 555, 562. The only major cost to be advanced before it is determined whether or not the defendant is liable is that of a class notice. *See Oppenheimer Fund, Inc.* v. *Sanders*, 1978, ... U.S. ....., 98 S.Ct. 2380, 57 L.Ed.2d 253. The postage for such a notice, if individual mailing is required, would be about $15,000. Counsel properly offered to advance that sum looking to the named plaintiffs for repayment if required. Their clients offered a note and mortgage on realty as security. Counsel has also offered to give a bond to guarantee that the notice costs will be met. The sufficiency of such action has been established, *Sayre* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, E.D.Pa.1974, 65 F.R.D. 379, *modified*, D.C. 1975, 69 F.R.D. 117; *Halverson* v. *Convenient Food Mart, Inc.*, 7 Cir. 1972, 458 F.2d 927, 931 n. 7.

[9] Neither the satisfaction nor denial of the individual plaintiffs' claims, if effective, necessarily precludes

4. According to Professor Arthur Miller, An Overview of Federal Class Actions: Past, Present and Future, (F.J.C.1977), at 32:

> There have been instances in which a district judge has concluded that the representatives are inadequate, at least in part, because they do not appear to have the financing to maintain the action. But this is a rather tricky consideration that must be treated with some care because if financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case is a factor, it probably should not be a determinative factor.

their serving as adequate representatives. We have permitted representatives to serve the class despite adjudications determining that their individual claims are not viable if they are members of the class and maintain an adequate nexus with it. *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34; *Huff* v. *N.D. Cass Co. of Ala.*, 5 Cir. 1973, 485 F.2d 710, 712-714 (*en banc*). *See Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701; *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 8 (slip op. 6531, 6538, note 8), approving this jurisprudence and distinguishing *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 1977, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453, on the basis that the named representatives in that case were not members of the class at the time the suit was filed nor at the time of the certification decision. The relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation. The defendant's decision to confess judgment has not affected the vigor with which plaintiffs have pursued the class claims, and we find no basis for concluding that they have not satisfied the requirements of Rule 23(a)(4).

B. *Superiority of a Class Action*

[10] This is a classic case for a Rule 23(b)(3) class action. The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation. The claims are relatively small, said even by the plaintiffs to average less than $100 each, and the question of law is one that applies alike to all. While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps

with some clerical assistance. It will not be necessary to hear evidence on each claim.

A number of similar class actions have been certified by district courts,[5] and appear to have been susceptible of management. Certification will achieve one of the primary purposes of the class action, "enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co. of California*, 1972, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184. We consider separately each of the factors that are argued to militate against certification.

1. *Common Issues*

[11] The legal issues, as the trial court correctly noted, are whether the finance or service charge made is subject to the Mississippi statute on usury—for such a charge might be considered exempt from the statute; whether the charge is interest and, if so, what rate of interest is permissible; and whether the rate actually paid in any given case is to be determined on a daily, monthy, or other basis, and what dates are to be used for determination of the rate. If the legal issues are resolved in favor of some or all of the members of the class, there would then be factual questions; whether the permissible rate was exceeded in any given case, and, if so, by what amount.

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5. *Cosgrove* v. *First & Merchants National Bank*, E.D.Va. 1975, 68 F.R.D. 555; *Weit* v. *Continental Illinois National Bank & Trust Co*, N.D.Ill.1973, 60 F.R.D. 5, *appeal dismissed*, 7 Cir. 1976, 535 F.2d 1010; *Cohen* v. *District of Columbia National Bank*, D.D.C.1972, 59 F.R.D. 84; *Partain* v. *First National Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56; *Zachary* v. *Chase Manhattan Bank*, S.D.N.Y.1971, 52 F.R.D. 532, together with a number of other cases reported by published decisions. *See* dicta in *Fisher* v. *First National Bank of Omaha*, 8 Cir. 1977, 548 F.2d 255, 262.

In determining these issues, it may (or may not, dependent upon Mississippi law), be important that the effective daily rate or monthly rate paid would vary from one account to another. If Mississippi law proscribes or permits a 1½% charge *per se*, the effective daily rate will be unimportant. If Mississippi law determines whether a charge is usurious depending not on its nominal terms but on the average daily rate charged, then whether the effective rate is based upon the period commencing when the bank receives the bill or when the customer receives the bill may determine whether the rate is usurious. Additionally, if the period ends on the date the charge is actually paid, as opposed to the date the charge is due, the effective rate charged a customer who paid his account five days after receiving a billing showing a finance charge (35 days after the charge was computed at the rate of 1½% a month) would be different from the rate paid by another customer who paid 29 days after receiving the bill (59 days after the charge was compiled).

Thus, it may (or again, may not, dependent on whether *any* charge made was usurious under Mississippi law, or whether every 1½% charge made was excessive, or whether some other standard applies) be necessary to reconstruct each card holder's account. Neither the trial court nor we can know in advance of a substantive decision whether it is necessary to make a computation (after all, the charge may be valid); or, if it is, how Mississippi law determines what is usurious and by what standards the computations are to be made. The best scenario for the utility of a class action is constructed if the trial court decides that the charge can never be considered usurious; the defendant disposes of 90,000 potential claims in one coup. The worst hypothesis will materialize if the court decides that Mississippi law requires the rate to be computed on each individual account on a daily-rate basis.

Whether the testimony of plaintiffs' expert (who has done a similar job before) or defendant's expert (who obviously fears disaster) be accepted, no computation need be made, and no costs need be incurred until the trial court determines the applicable Mississippi rule and, if Mississippi law appears to create liability, sets standards for its application, perhaps by an inexpensive preliminary sample of accounts.

Hence, common questions predominate for purposes of satisfying Rule 23(b)(3); the issues unique to each claim, if any are raised, are not so complex as to make the costs of determination prohibitive, or to require individual evidentiary hearings.

2. *Availability of Other Relief*

The potential class members cannot effectively secure relief, if any is due, by another type of action. The suggestion by the defendant that each plaintiff might resort to a Mississippi small claims court assumes that the procedures of such courts are adequate for the sophisticated type of claim here presented, and that Mississippi state courts could handle this volume of suits. Moreover, the national bank defendant could remove every such case to federal court. 28 U.S.C. §§ 1337 and 1441(b); *see Partain* v. *First Nat'l. Bank*, 5 Cir. 1972, 467 F.2d 167. *Cf. Marquette Nat'l. Bank* v. *First Nat'l. Bank*, D.Minn.1976, 422 F.Supp. 1346.

What is more important is that each plaintiff has the right to seek relief in federal court. If even one-twentieth of them chose to do so, the court would have 5000 suits to dispose of, approximately four times the total number of suits of all kinds filed with its clerk annually.[6] Should

6. Management Statistics for United States Courts 1977, at 60. One thousand two hundred eighty nine (1,289) cases were filed in the Southern District of Mississippi in the twelve month period ending June 30, 1977.

a federal forum be used for such individual actions, the cost of each action would surely increase, as would the cost of determining damages. The alleged statutory wrong may go unchallenged because the costs of proof exceed the likely recovery. *See* Wright & Miller, Federal Practice and Procedure, § 1779 at 61 (1972 ed.).

[12] Even assuming *arguendo* that multiple individual actions were feasible, they would be wasteful and uneconomical. This is precisely the problem that Rule 23 was designed to prevent. "The very purpose to be served by a class action is the opportunity it affords to prevent a multiplicity of suits based on a wrong common to all." *Green* v. *Wolf Corp.*, 2 Cir. 1968, 406 F.2d 291, *cert. denied*, 1969, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766.

3. *Impact on Defendant*

In Truth-in-Lending actions, Congress has manifested its concern about suits potentially ruinous to defendants by limiting recovery. 15 U.S.C. § 1691e. There appears to be no comparable limit for class actions under the National Banking Act although recovery is limited in actions of this type to twice the amount of the interest paid. 12 U.S.C. § 86. *See McCollum* v. *Hamilton Nat'l. Bank*, 1938, 303 U.S. 245, 247, 58 S.Ct. 568, 570, 82 L.Ed. 819; *Coral Gables First Nat'l. Bank* v. *Constructors of Fla., Inc.*, Fla. App. 1960, 119 So.2d 741; *First Nat'l. Bank* v. *Lowery*, 1937, 234 Ala. 56, 173 So. 382; *First Nat'l. Bank* v. *Davis*, 1911, 135 Ga. 687, 70 S.E. 246. We find no evidence that Congress otherwise sought to protect the net worth of national banks against damaging suits if, in fact, they overcharged their customers. If it be assumed, however, that courts should heed hurricane warnings about potential disasters to defendants and use them as a reason to evacuate class actions then, we consider this to be less than catastrophic. It it is assumed that the defendant is correct when it states

that about 35% of the card holders paid no service charge, then the number of potential claimants is 60,000. If the average recovery is $100 each, the potential liability is large ($12,000,000) but not ruinous to a defendant with capital accounts of $45,000,000 and with assets of $520,000,000.

[13] Unlike the situation under some statutes, we are not concerned with a fixed minimum penalty of a substantial amount for a technical violation, *see Partain* v. *First Nat'l. Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56, 60-61, that if magnified, would exact a punishment unrelated to statutory purposes. *Compare Ratner* v. *Chemical Bank N. Y. Trust Co.*, S.D.N.Y.1972, 54 F.R.D. 412. Because considering the financial impact of a judgment presupposes success on the merits and requires the trial court to express an opinion on the harshness *vel non* of a particular remedy prior to trial itself, it ought to be allowed only in extreme cases.

4. *Mississippi Usury Law and Aggregation*

[14-17] Nor is the attitude of Mississippi law disfavoring usury suits sufficient to deter the entertainment of this class action. Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned.[7] *Fry* v. *Layton*, 1941, 191 Miss. 17, 2 So.2d 561.[8] Of course, we deal here with a

7. Class action treatment in the present case is not the same as aggregation of claims. Recovery for each individual member of the class is sought, and for no more than the amount of the illegal interest extracted from each class member and the equal penalty payable to each class member.

8. In *Fry* v. *Layton, supra*, the Mississippi statute required a forfeiture of both interest *and principal*. The appellee had sought to buy up claims from borrowers of a loan company and thereafter aggregate such claims and recover of the lender both interest *and principal*. This type of scheme was denominated "legal fraud" by the Mississippi court. 2 So.2d at 565.

claim against a national bank, controlled in matters of procedure by the Federal Rules of Civil Procedure. *John R. Alley & Co.* v. *Federal Nat'l. Bank of Shawnee*, 10 Cir. 1942, 124 F.2d 995; the action is regulated by federal law, although the federal statute may look to local law as surrogate federal law for determining the permissible interest charges. 12 U.S.C. § 85.[9] As we said in *Partain* v. *First National Bank of Montgomery*, 5 Cir. 1972, 467 F.2d 167, 173:

> This interplay between the federal statute and State usury laws is elucidated by *Evans* v. *National Bank*, 251 U.S. 108, 40 S.Ct. 58, 64 L.Ed. 171 (1919): "The National Bank Act establishes a system of general regulations. It adopts usury laws of the states *only* insofar as they severally fix the rate of interest"; by *National Bank* v. *Johnson*, 104 U.S. 271, 26 L.Ed. 742 (1881): "The sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make . . . ."

(Emphasis added & original)

Hence, the state law with respect to aggregating usury claims that derive from state law is inapposite with respect to claims founded on federal statute, and would yield to Rule 23, F.R.C.P., even if relevant.

9. These provisions of the Act were designed by Congress to place national banks on a plane of competitive equality with other lenders in respective states by adopting state law with respect to permissible interest rates. *Fisher* v. *First National Bank*, 8 Cir. 1977, 548 F.2d 255; *First National Bank in Mena* v. *Nowlin*, 8 Cir. 1975, 509 F.2d 872; *Brown* v. *First Nat'l City Bank*, 2 Cir. 1974, 503 F.2d 114; *Monongahela Appliance Co.* v. *Community Bank & Trust, N.A.*, N.D.W.Va., 1975, 393 F.Supp. 1226, *aff'd*, 4 Cir. 1976, 532 F.2d 751.

5. *Manageability*

[18] The case presents no unusual difficulties in class management. While the class is large, it is peculiarly manageable. All the members live in one state, the defendant has each member's address on a computer; both that address and the itemized history of each account can readily be obtained.

After substantive rulings a e made on the basic issues of liability and damage computation, the case is so manageable that a computer, either in the bank itself or leased elsewhere, can handle its *administration*—as distinguished from the ultimate computation which may in some instances require clerical personnel. The task is not a particularly difficult one when compared to the work that the bank ordinarily performs on its own computer. Under any theory the work involved in the refund computation procedure will represent only a small fraction of the work originally done on the credit card accounts by the bank's computer operation. The evidence shows that this ordinary work was done with such comparative ease that the computer could also do all of the other work of the bank, plus the work of 60 or 70 other banks under contract with it and continue to advertise for more business.

We do not agree with the trial court that there is a serious possibility that the defendant, "faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions." We do not minimize the effect of "strike actions," and we certainly do not applaud them. But, as we have indicated, the specter of large cost will materialize only if, after a preliminary hearing, it appears likely that damages are actually due a large number of class members. Only then,

after liability is determined, will there be substantial cost, either in defense or in payment of damages.

[19] The lower court alluded to the potential problem of counter-claims. This likewise can be handled, if that point is reached, by adopting standards and classifying the claims. *See Weit* v. *Continental Illinois Nat'l. Bank*, N.D. Ill. 1973, 60 F.R.D. 5. If the court should conclude at any time that the entire group of counter-claims makes the plaintiffs' claims on behalf of such persons unmanageable, the court has the continuing authority under Rule 23 to issue a supplemental order excluding counter-claim defendants from the plaintiff class or separating and severing the class into two different classes, one with counter-claims and one without counter-claims. As Judge Johnson said in *Partain, supra*:

> The potential assertion of counter claims against these few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled. At the same time the rights of the defendant should be protected.

59 F.R.D. at 59.

Of course, the easiest way for any court to handle complex class litigation is simply to deny certification; this may have the real effect of permitting a defendant to violate a federal statute either with impunity or minor expense. In the present case few of the individual claimants would have the resources necessary to litigate against a well-financed defendant. This consideration underlies the decision of the Seventh Circuit in *Hohmann* v. *Packard Instrument Co.*, 7 Cir. 1968, 399 F.2d 711, which found a similar situation a classic one for sustaining the class action

involved. Quoting its prior decision in *Weeks* v. *Bareco Oil Company*, 7 Cir. 1941, 125 F.2d 84, 90, the court said:

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

399 F.2d at 715.

For these reasons, we REVERSE and REMAND to the trial court for further proceedings consistent with this opinion.

THORNBERRY, Circuit Judge, specially concurring:

I write separately to express my views on the mootness issue discussed in Part II of Judge Rubin's thorough and scholarly opinion, which I fully join in all other respects. Although I agree that a defendant should not be able to terminate a class action by tendering a few dollars to a putative class representative, I cannot subscribe to the sweeping dicta in the majority opinion that treats fact situations foreign to the instant case. Here the named plaintiffs strenuously objected to the defendant's "settlement" offer, and it cannot be said that a true settlement took place. The voluntary acceptance by named plaintiffs of such an offer is not involved, however, and I see no need to address the mootness question that it would present.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-3600

D. C. Docket No. CA-4261-(N)

ROBERT L. ROPER, ET AL.,
Plaintiffs-Appellants,

versus

CONSURVE, INC., d/b/a BankAmericard Center, and DEPOSIT GUARANTY NATIONAL BANK, Jackson, Mississippi,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504—598-6514
600 Camp Street
New Orleans, La. 70130

October 20, 1978

TO ALL PARTIES LISTED BELOW:

No. 76-3600—Robert L. Roper, et al. vs. Consurve, Inc. etc. and Deposit Guaranty National Bank, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By /s/ Clare F. Sachs
Deputy Clerk

cc Mr. William Roberts Wilson, Jr.
Mr. Toxey Hall Smith, Jr.
Mr. Frederick G. Helmsing
Mr. Champ Lyons
Mr. Vardaman S. Dunn

LETTER TO CLERK OF FIFTH CIRCUIT FROM VARDAMAN S. DUNN

(Filed April 17, 1978)

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April 14, 1978

Mr. Edward W. Wadsworth, Clerk
United States Court of Appeals
Fifth Circuit
Room 102, 600 Camp Street
New Orleans, Louisiana 70130

RE: Robert L. Roper, et al. v.
Consurve, Inc., No. 76-3600

Dear Sir:

When this case was argued orally on Tuesday, April 11, Judge Thornberry requested that we obtain for the Court a Certificate from the United States District Court Clerk regarding a certain matter involved.

We have obtained the Certificate and the original and three copies are enclosed herewith.

I am also enclosing four extra copies of this letter. Will you please distribute this Certificate and letters to the members of the panel consisting of Judges Thornberry, Wisdom and Rubin and oblige.

Yours very truly,

/s/ V. S. Dunn
Vardaman S. Dunn

VSD:nc
Enclosures
cc: Mr. Frederick G. Helmsing

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION No. 4261(N)

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

vs.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,
Defendants.

CERTIFICATE OF CLERK

I, the undersigned Clerk of the Court aforesaid, do hereby certify that the following appears from the record in this office:

1. On July 15, 1976, a receipt was issued by the Clerk to Mr. Vardaman Dunn, tendering $1,312.96 into the registry of this Court, a true copy of which is attached to this Certificate.

2. The sum of $1,312.96 has remained and is now in the registry of this Court.

3. Attached hereto is a true copy of the Judgment under which the above payment into the registry of the court was made.

4. There is no record that any request for disbursement from the registry of the Court has been made or filed by either Robert L. Roper or Jack Hudgins.

SO CERTIFIED, this the 14th day of April, 1978.

Harvey G. Henderson, Clerk
United States District Court

By: /s/ Bobbie J. Price
Deputy Clerk

(Exhibits Appear Elsewhere in Appendix)

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
Petitioner,

vs.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

BRIEF OF ROBERT L. ROPER, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
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Respondents.

BRIEF OF ROBERT L. ROPER, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL QUESTIONS PRESENTED

1. As to defendant's Questions Presented I-II: Whether the defendant's deliberate conduct designed to avoid review of the claim for class-wide relief precludes it from pointing to the absence of intervenors as the basis for an alleged mootness.

2. As to defendant's Questions Presented I-II: Whether plaintiffs have a personal stake in the controversy by reason of the prospect of spreading expenses of litigation among more claimants.

3. As to defendant's Questions Presented I-II: Whether certiorari should be granted to review dicta as to the duty of a named plaintiff after an adverse ruling on the certification claim where the rejection by the Court of the dicta could not affect the result in the case at bar.

SUPPLEMENT TO STATEMENT OF THE CASE

The record clearly reflects that the District Court's judgment was entered over the objection of the plaintiffs. The defendant's insinuation that the objection was interposed by counsel acting independently of the plaintiffs is without foundation in the record or basis in fact.

The plaintiffs contended below that their stake in the appeal as named plaintiffs included the prospect of spreading the very extensive, generally non-taxable, out-of-pocket expenses among more claimants, thus reducing substantially the financial burden incurred by them in conducting the litigation in the District Court. Plaintiffs also referred below to the prospect of risk of loss of personal respect and credibility as a result of having offered their names as class champions to a cause which could not end in a payoff to the named plaintiffs alone without some stigma on them as poor stewards over the rights of the class. The defendant made no argument below concerning the technical sufficiency of the phraseology of the notice of appeal.

No intervenors have appeared but defendant has never challenged the correctness of a statement made by plaintiffs in the Court of Appeals to the effect that an intervenor would not make this controversy any more live than it already is because of the likelihood that the defendant would resort to the technical expedient of voluntarily paying into court the amount claimed by each such intervenor piecemeal in order to escape review of the merits of the class action determination. Also, and most significantly, the record reflects that after defendant offered judgment to the named plaintiffs, the named plaintiffs made a counter-offer of judgment on terms which would have expressly recognized the right of review on behalf of the class. Defendant rejected this offer and is now in no position to imply that it would have proceeded directly to a review of the denial of certification had an intervenor only appeared.

ARGUMENT

While defendant laments the multiplicity of class actions, the Fifth Circuit correctly noted that if it were so easy to end class actions by permitting a defendant to pay off the named plaintiffs, through coercion or otherwise, few class actions would survive. See App. F., p. A 36, Petition.

The Seventh Circuit case of *Winokur* v. *Bell Federal Savings and Loan Ass'n*, 560 F. 2d 271 (7th Cir. 1977), reh. den. *en banc*, 562 F. 2d 1034, cert. den., 98 S. Ct. 1507 (1978), relied upon by defendant as the basis for a contention of conflict within the circuits, is distinguishable. In *Winokur*, the plaintiffs' individual claims were moot, no intervenors had appeared and, *unlike the instant case, nothing in the Winokur record clearly showed that the defendants would have resisted review of the certification question even if intervenors had appeared.*

The defendant bank, nonetheless, places much emphasis on the absence of intervenors, as well it should, because this Court has recognized the right of an intervenor to pick up the class standard and prosecute a review of an adverse certification ruling. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). However, implicit in defendant's argument as to the lack of intervenors is the presumption that, had an intervenor appeared, the defendant would have moved quietly on to a review of the certification ruling on its merits. Defendant's own conduct affirmatively shows that it is not entitled to any such presumption. In this case, as already noted, when the defendant served the plaintiffs

with its offer of judgment, plaintiffs made a counter-offer of judgment which, if it had been accepted by the defendant, would have expressly preserved the question of certification of the class for review in the Court of Appeals. The defendant flatly rejected this counter-offer of judgment. Therefore, the Fifth Circuit s observation that intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal is based on ample evidence of an intent by the defendant to do all that is necessary to avoid class-wide review. Under this state of the record, the defendant is precluded from bemoaning the absence of intervenors and this case therefore is just as live a controversy as it would have been had intervenors appeared under the teaching of *United Airlines, Inc* v. *McDonald.*

Defendant announced reliance upon *Winokur* prior to the oral argument in the Fifth Circuit. Copies of all of the proceedings in this Court in *Winokur* were delivered by the plaintiffs to the Fifth Circuit panel at the time of oral argument. A study of the *Winokur* pleadings which were filed in this Court gives the clear impression that the defendant ought not draw comfort from this Court's denial of certiorari in *Winokur*. For example, the "Additional Questions Presented" portion of the Brief in Opposition to the Petition, filed by the Respondent in *Winokur*, discloses the presence of substantial "non-merits" grounds for denial of the writ by this Court. These points included:

(1) A contention that a substantial objection to the opinion below was only dicta that could not affect the result;

(2) A contention that the plaintiffs' mootness question was expressly waived by the plaintiffs in the District Court, and that such waiver was expressly relied upon by the District Court in deciding the case;

(3) A contention that the mootness question was not briefed in the Court of Appeals prior to decision and only presented for the first time in a petition for rehearing in the Court of Appeals over defendant's objection that it had been waived;

(4) A contention that the plaintiff had earlier taken the opposite position in a prior petition for certiorari in the same case;

(5) A suggestion of disqualification of the named plaintiffs as adequate representatives of the class by reason of the close relationship between the named plaintiffs and the attorney who would represent the class.

The absence of intervenors is not fatal to plaintiffs' position in any event by reason of the personal stake in the controversy that the named plaintiffs have by reason of their prospect for the spreading of expenses on a class-wide basis if class-wide relief is allowed. Substantial expenses have been incurred in the proceeding thus far by the named plaintiffs as class champions and such expenses may well exceed the full amount of the individual claim of each plaintiff. The prospect therefore for spreading these expenses among a large group of people is certainly far beyond the level of *de minimis* and is a personal stake in the controversy which entitles these plaintiffs to proceed on behalf of the class to an adjudication of the certification question. Finally, there is an intangible personal stake in the hands of the named plaintiffs by reason of their having lent their names as class champions to a cause which they have a right to see brought to a more savory conclusion than a coerced payoff.

While defendant takes sharp issue with the Court of Appeals' conclusion that there exists a duty on the part of a class champion to seek appellate review of a refusal

to certify the class question, the record in this case shows that the named plaintiffs have prosecuted the appeal. It matters not whether they did so out of right or out of duty. Consequently, the dicta of the Court of Appeals on this issue does not merit the granting of the petition for writ of certiorari because it could not affect the result in the case at bar.

CONCLUSION

The instant case is clearly distinguishable from *Winokur*, and the named plaintiffs here clearly retain a personal financial stake in undertaking the appeal to the Fifth Circuit. The decision of that court is consistent with the decisions of the Supreme Court, particularly *United Airlines* v. *McDonald, supra.* For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 78-904

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,
Petitioner,

VS.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CASES

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Respondents.

REPLY TO BRIEF IN OPPOSITION

This reply to the brief in opposition is offered, because of the recognized importance of respondents' added question No. 2.

> "Whether plaintiffs have a personal stake in the controversy by reason of the prospect of spreading expenses of litigation among more claimants."

These expenses consist of what is described as "generally non-taxable, out-of-pocket expenses". The "spreading" refers to the shifting of expenses to others of the "class" who might fail to opt out on notice after a certification of the case as a class action. The "prospect" is that the Court might require these solicited parties to share the expense of securing the class certification.

The facts are not in dispute. The defendant has tendered to the named plaintiffs all that they demand, plus legal court costs, which is all that could ever have been recovered against the defendant in the case before the Court.

There is nothing left for the named plaintiffs to recover which can be recognized as an item in litigation. The so-called "generally non-taxable, out-of-pocket expenses" are not recoverable items in litigation.

The extreme importance of the question lies with the fact that if "generally non-taxable, out-of-pocket expenses" can supply the required personal stake ingredient of a case or controversy, *then no class action attempt could ever become moot, because every such attempt will, of necessity, involve some such generally non-taxable, out-of-pocket expenses.*

Of equal concern, and for like reason, is the hypothesis that the self-appointed class champions run the risk of loss of "personal respect and credibility" for having failed to obtain certification. This emotional factor could also be suggested in every case to prevent the case from ever becoming moot.

If either of these concepts is allowed to prevail, mootness will be totally foreign to all cases cast in class action form.

The Fifth Circuit said that if a defendant may "short circuit" a class action by paying off the class representative, and if it were so easy to end class actions, few would survive. While this view that some way must be found for class actions to survive does not expressly adopt respondents' argument, it is consistent with it.

There is, of course, the possibility that class action attempts will, from time to time, perish in this fashion. On the other hand, if the Fifth Circuit's philosophy becomes the law of the land, then *every* class action will survive and live on to a ripe old age.

Is it better that some class actions perish or that all Rule 23(b)(3) class actions survive at any cost?

This Court has the opportunity in this case to make the choice. Will the Court adhere to the "personal stake" test for jurisdictional purposes and thereby permit some Rule 23(b)(3) class action attempts to perish, or will the Court embrace the "nexus" test and adopt the philosophy that whenever a complaint is filed as a class action, a way must be found to keep it alive after death of the controversy between the named parties before the Court?

The only subject matter involved here is the recovery of money. Therefore, the personal stake must be a money stake, because there is nothing else involved out of which to construct a case or controversy. Therefore, when the named plaintiffs no longer have a personal money stake in the outcome, the case as to them is moot.

To maintain a money stake, the plaintiffs' financial interest must be real and direct. In *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), the Court, after announcing this rule, applied the jurisdictional truism to class actions, saying:

> ". . . Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); Indiana

> Employment Division v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed.2d 62 (1973). See 3 B. J. Moore, Federal Practice, ¶23.10-1, n. 8 (2d ed. 1971)." (94 S.Ct. at 676)

There can be no remaining financial interest at stake when the plaintiff has recovered all that he claims or the law allows. There is absolutely no plaintiff before the Court who has not received full satisfaction. There is nothing real or "direct" in a residual "nexus", when financial interest is gone.

The concept of a self-styled class representative whose self-appointed status is rejected, may lose "personal respect and credibility" for having received satisfaction is no more than an emotional approach, and this is not enough to meet the case or controversy requirement, as was held in *Ashcroft* v. *Mattis*, 97 S.Ct. 1739 (1977):

> ". . . Emotional involvement in a lawsuit is not enough to meet the case or controversy requirement; were the rule otherwise, few cases could ever become moot." (97 S.Ct. at 1740)

The emotional test, so thus rejected by this Court, is on somewhat of a parity with the undefinable "nexus" test embraced by the Court of Appeals.

When challenged, jurisdiction must rest upon facts alleged and proven and the party asserting jurisdiction has the burden of proof and persuasion. *McNutt* v. *General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 56 S.Ct. 780 (1936).

This burden of proving a continuing personal money stake in the case has not been met and the decision of the Court of Appeals can stand only if the "personal stake" test is abandoned in favor of the undefinable "nexus" test as adopted by the Fifth Circuit.

No attempt has been made by respondents to discuss the remaining questions tendered by the Petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,
Petitioner,

vs.

ROBERT L. ROPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

On Petition of Deposit Guaranty National Bank of Jackson, Mississippi, and by order entered here on March 5, 1979, a writ of certiorari issued to the United States Court of Appeals for the Fifth Circuit to review its decision, entered August 24, 1978, reversing the District Court's order denying a Rule 23(b)(3) class action status in a suit asserting liability for the penalties of usury in favor of a "class" of 90,000 credit card customers of the defendant bank.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. The opinion of the Court of Appeals for the Fifth Circuit is reported at 578 F.2d 1106.

Both are appended. Also included is the Judgment of the District Court dismissing the Complaint on payment of the amount demanded.

JURISDICTION

Jurisdiction is based on 28 U.S.C., §1254(1). The Court of Appeals entered its decision on August 24, 1978 and denied re-hearing on October 20, 1978. The Petition for the Writ was filed here on November 29, 1978.

QUESTIONS PRESENTED ON REVIEW

I.

For jurisdictional purposes, does a Complaint seeking damages (penalties of usury), when coupled with a class action request, survive the death of the controversy between the named parties before the Court, when the death is occasioned by an effective tender to the named plaintiff of his total damage after the District Court, on a full record, has been afforded the opportunity to certify the class but has entered an order declining to certify the suit for class action status?

II.

Does a case in which Rule 23(b)(3) class action status is requested, but denied by the District Court, become moot when the nominal plaintiff is paid in full, after such denial, and no longer maintains a personal interest stake in the outcome of the litigation?

Since the remaining questions, as tendered by the Petition, were not included in the order granting review, these are not re-stated here.

STATEMENT OF THE CASE

Two individual credit card holders appeared as the named plaintiffs in an action filed in the Mississippi District Court. The plaintiffs alleged violation of the Mississippi statutes on usury and sought to recover for violation of these state statutes to the degree allowed by the National Banking Act. (12 U.S.C., §§85-86, Addendum to Brief, Add. B and C, infra) The Amended Complaint (A. 9-17, 24-25), filed on March 6, 1972, claimed that it was in behalf of the plaintiffs and others "similarly situated", reference being to 90,000 other unnamed credit card holders.[1] A class certification was requested by motion. (A. 18) The Complaint, as amended and supplemented, includes a four-year period prior to the revision of the state's interest statutes in 1974.

Over a period of more than four years, a massive record was developed on the "class action" issue. Acting upon this and in the light of several conferences with the Court, an order was finally entered denying class action status. The comprehensive opinion of the District Court is found in the Appendix. (A. 29-47)

On the Rule 23(b)(3) class action issue, the District Court found, in sum, that: (1) the plaintiffs could not fairly and adequately represent the class because they were neither willing nor able to finance the case as a class action; (2) by pragmatic standards, the case was unmanageable as a class action; (3) a class action was not superior to other available methods for the fair and efficient adjudication of the controversy, especially in view of (a) the availability of traditional procedures for prose-

1. The Complaint also included a Count seeking recovery under the Truth-In-Lending Act, but this Count was abandoned and dismissed on the plaintiffs' motion. (A. 55, 56)

cuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (b) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender;[2] (c) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Bank Act; (d) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys, and (e) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who had at least equal claim upon the Court's time and energies. (A. 29-47)

The final order (A. 48-49), entered October 15, 1975, overruled the motion for class certification and directed that the case proceed in all respects upon the individual complaints as in other cases. A request for leave to appeal from the interlocutory order was denied. (A. 50)

Over seven months after certification was so thus denied, the defendant, weary of the litigation, tendered to the named plaintiffs all that they demanded, plus legal interest and court costs.[3] (A. 51-54) No one else having sought to intervene and assert claims, the District Court accepted this tender, over the lawyers' objection, as an appropriate disposition of the case, and ordered that the Complaint be dismissed. (A. 57-58, 60-61) The money

2. *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 55 (Miss. 1974). Cf. *Deposit Guaranty Bank & Trust Co.* v. *Williams*, 193 Miss. 432, 9 So.2d 638 (1942); *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941).

3. Contemporaneously with the tender and on motion in behalf of the nominal plaintiffs, the Truth-In-Lending Count of the Complaint was voluntarily dismissed with prejudice. (A. 55, 56)

was paid into Court, as authorized by the Court's order. (A. 62) The plaintiffs thereby received all that they demanded and all that they could recover in their suit.

No contention has ever been made that the nominal plaintiffs did not receive by the Court approved tender everything demanded by them in the complaint which used their names, and no appeal was noticed in their behalf. There was no appeal by the nominal plaintiffs in their own right, but their attorneys filed a notice of appeal in plaintiffs' names, purportedly and only "on behalf of all others similarly situated". (A. 63) However, not one potential member of the unnamed and uncertified class had sought to intervene for purposes of appeal or to join in or authorize the attempted appeal.

The bank moved for dismissal of the appeal on the ground that the case was moot. (A. 64-65) The Fifth Circuit carried the motion with the case and then overruled the motion and proceeded to reverse the orders of the District Court and to direct certification of a class. (A. 65-88, 578 F.2d 1106) To summarize the holding:

On the mootness question, the Court held that by the very act of filing a complaint as a class action, the nominal plaintiffs assumed a duty to the potential class which precluded them from taking satisfaction and were not only permitted but were duty-bound to appeal a denial of certification, unless excused by the Court. Despite the plaintiffs' complete loss of all personal financial interest in the case, the Court held, nevertheless, that "the individual plaintiffs would maintain a stake in procuring class-wide relief", because, it was said, they maintained a "nexus" with the "class" despite the mootness of their own claims, and that a "case or controversy" persisted. (A. 74-76, 578 F.2d at 1110-1111)

SUMMARY OF ARGUMENT

The action was moot on arrival at the Court of Appeals. The nominal plaintiffs had received full satisfaction and maintained no personal interest stake in the outcome. The putative Rule 23(b)(3) "class" was never certified but was rejected by the District Court.

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1965); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1968); *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (A. 61) This terminated the controversy between the named parties before the Court.

Since the "class" was never certified by the District Court, it had not acquired a legal status when the case arrived at the appellate level, and its unnamed potential members were not parties before that Court. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976).

The jurisdictional standard bearer must "stand to profit in some personal interest" in order to maintain standing

to invoke the Court's continuing jurisdiction. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, supra.

It is not enough that a case or controversy exists when the complaint is filed. It must exist at each and every stage of the proceeding, including appellate stages. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Prieser* v. *Newkirk*, 422 U.S. 395, 95 S.Ct. 2330 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209 (1974), N. 10 at 94 S.Ct. 1216.

It has been held that a "class", when properly certified by the District Court, attains a legal status separate from the interest asserted by the plaintiff and that certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, if a live controversy remains as between members of the certified class and the defendant. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975); *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976); *Zablocki* v. *Redhail*, ... U.S. ....., 98 S.Ct. 673 (1978), N. 9, at 679.

However, in at least five "class action" situations, this Court has rejected the claim to legal status of the "class" and has directed dismissal for mootness, where the District Court has either failed to duly certify a class or has expressly declined to certify the class and the nominal plaintiff fails to maintain his personal interest stake in the action. *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974) (unconstitutional practices in the administration of criminal justice); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975) (unconstitutional interference with news publication); *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976) (unconstitutional prison disciplinary procedures); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975) (viola-

tion of procedural rights in considering eligibility of prisoners for parole); *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697 (1976) (unconstitutional segregation in high schools).

In order to become a class action for purposes of conferring litigant status upon members of the class, it must be first certified. As held in *Kremens* v. *Bartley,* 431 U.S. 119, 97 S.Ct. 1709 (1977):

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

Therefore, it follows that the case at bar never became a class action and members of the class never attained a legal status as parties before the Court and did not succeed to the adversary position once held by the nominal plaintiffs.

The Fifth Circuit suggested that the tender was to "short circuit a class action by paying off the class representative", but there was nothing wrong about the tender. The defendant simply exercised the traditional right of every defendant who is sued to buy peace. That right was one of substance. Settlements are highly favored. *Pearson* v. *Ecological Service Corp.,* 522 F.2d 171 (CA 5, 1975), cert. den. sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976).

The disposition of the litigation by this means harmed no one. The payment in satisfaction of the named plaintiffs did not affect, but carefully preserved, the rights of anyone else who might wish to come forward and assert claims in the future.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one

else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the seven months' lapse of time between the denial of class certification and the final order of dismissal afforded ample time.

By reason of the tender, mootness became a fact as did the non-existence of a continuing live controversy as between any parties before the Court.

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise. Cf. *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 40 S.Ct. 448 (1920); *State of California* v. *San Pablo & T. R. Co.,* 149 U.S. 308, 13 S.Ct. 876 (1893).

The case at bar does not fall within any recognized or suggested exceptions to the mootness doctrine.

There is no violation of federal law which is "capable of repetition, yet evading review". No injunctive relief is sought. The alleged violation of the state's usury statutes is not capable of repetition, because Mississippi amended its interest laws in 1974 to allow service charges in excess of those complained of here and made the statute retroactive. (Add. D, infra)

Unlike the Civil Rights cases which are quasi-public in nature, the instant case is a purely commercial type lawsuit seeking a money recovery only in behalf of the named plaintiffs. The only thing out of the ordinary about it is the effort, in the plaintiffs' names, to solicit, under the aegis of the Court, some 90,000 potential small claims for litigation in the federal district court, with the constant danger, if not the certainty, that the action will degenerate in practice into multiple lawsuits to be separately tried.

There is no significant public interest involved. Instead, the aggregation of usury claims in the class action format violates the articulated public policy of the state and is viewed and condemned on the state level as a legal fraud.[4]

There are no reforms left to be made, social or otherwise. There is no overwhelming federal social policy involved. In brief, there are no circumstances present here which might serve as a temptation to broaden the traditional concept of a "case or controversy" for jurisdictional purposes.

The view that the mere filing of a damage action as a class action makes it such and creates fiduciary duties to the unknown members of a putative class which prevents termination of the action by satisfaction or dismissal without appeal simply re-writes Rule 23 and requires that every case involving class action allegations will have to be tried on its merits in the District Court and reviewed on appeal before an end can be brought to the action. The adverse impact of such a decision upon both litigants and courts should be obvious.

No such court-appointed "duty" to continue litigation after the personal interest stake has been lost has ever heretofore been considered as a substitute for the personal stake required for Article III jurisdiction.

The decision of the Fifth Circuit is in direct conflict with the Seventh Circuit's decision in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. denied en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507

4. See *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941), and *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (Miss., 1974). Cf. Point II, pp. 19-21, Petition for Writ of Certiorari, this Case No. 78-904; Opinion of the U. S. District Court. (A. 43)

(1978), and with its own prior decision in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. denied sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976).

Also, the decision conflicts with the five decisions of this Court, above cited, by which this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

The decision of the Fifth Circuit should be vacated and the judgment of dismissal entered by the District Court should be reinstated.

ARGUMENT

I.

Preliminary Comment on the Fifth Circuit's Class Action Position

Writing for the Second Circuit[5] in 1973, Judge Medina lamented that "Class actions have sprouted and multiplied like the leaves on the green bay tree". In the same opinion, much of the blame was placed on the adoption of "the erroneous and frustrating view that some way *must* be found to make the case viable as a class action". Since 1973, class actions have continued to sprout and multiply at an ever increasing rate.

The Fifth Circuit has embraced the "must" philosophy, viewed by other courts as erroneous and frustrating. The Court's first adoption of this approach was in the context of suits involving violations of the Civil Rights Act of 1964. The theory was that such cases were quasi-public and class actions by nature, whether so-called or not. The plaintiff became a private Attorney General and the Court assumed a special responsibility to resolve the dispute and protect the class. Cf. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (CA 5, 1968); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (CA 5, 1970).

The spurious class action under Rule 23(b)(3) is not imbued with such policy consideration, however, and is not a class action by nature, and the same court in *Pearson* v.

5. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA 2, 1973), affirmed, 417 U.S. 156, 94 S.Ct. 2140 (1974). In *Eisen II*, *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (CA 2, 1968), Judge Lumbard, dissenting, observed that: ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . ." (391 F.2d at 572)

Ecological Service Corp., 522 F.2d 171 (CA 5, 1975), reh. denied en banc, 562 F.2d 1034, cert. den., 96 S.Ct. 1508 (1976) held that a settlement between the nominal parties after a denial of class action status under Rule 23(b)(3) rendered the case moot and beyond the Court's review jurisdiction.

The issue in the case at bar is even further removed from the pressures of broad federal policy considerations than was the securities fraud issue in *Pearson*, supra, yet the Fifth Circuit proceeded to ignore its previous holding in that case and to adopt the same exceptional "must" treatment previously reserved for Civil Rights cases, thereby raising critical jurisdictional questions in the context of spurious class action attempts, which arise from:

(a) The use of a vague "nexus" test to determine mootness in the place of the "personal interest stake" test announced by this Court;

(b) The conferring of litigant status upon an uncertified putative class, despite trial court denial of class action status, in order to retain jurisdiction under the requirement for existence of a live case or controversy;

(c) The fixing of a duty upon a nominal plaintiff to reject satisfaction of his own claim, when tendered after an adverse ruling on the certification claim, and the duty to appeal an order denying class action status unless excused by the court, - thereby forcing merits trials and appeals in all cases filed as class action attempts, whether certified for class status or not.

The mootness decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeal and, in principle, with its own prior decision. It also adopts and implements a test for mootness which is at variance with and in contradiction of decisions of this Court.

II.

The Nominal Plaintiffs Retained No Personal Interest Stake and As to Them, the Case Was Dead on Arrival at the Appellate Level

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1965); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1968); *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (A. 61) This terminated the controversy between the named parties before the Court.

III.

The Putative Class Never Acquired a Legal Status and Cannot Supply "Case or Controversy" Jurisdiction

The "class" was never certified by the District Court. It, therefore, had not acquired a legal status when the case arrived at the appellate level, and its unnamed potential members were not parties before that Court.

The possession of an existing live case or controversy by a party with legal status before the Court is a constitutional condition precedent to the existence of federal court jurisdiction under Article III, Constitution of the United States. (Add. A, infra) As expressed in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976):

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See Flast v. Cohen, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947, 958 (1968). The concept of standing is part of this limitation. . . ." (96 S.Ct. at 1924)

It is not enough that a case or controversy exist when the complaint is filed. It must exist at each and every stage of the proceeding, including appellate stages. *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Prieser* v. *Newkirk*, 422 U.S. 395, 95 S.Ct. 2330 (1975); *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209 (1974), N. 10 at 94 S.Ct. 1216.

As expressed in *Sosna* v. *Iowa*, supra:

> ". . . There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . ." (95 S.Ct. at 559)

The jurisdictional standard bearer must "stand to profit in some personal interest" in order to maintain standing to invoke the Court's continuing jurisdiction. As put in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, supra:

> "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal

interest remains an Art. III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies. . . ." (96 S.Ct. at 1925)

It has been held that a "class", when properly certified by the District Court, attains a legal status separate from the interest asserted by the plaintiff and that prior certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, if a live controversy remains as between members of the certified class and the defendant. *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975); *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S.Ct. 854 (1975); *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747, 96 S.Ct. 1251 (1976); *Zablocki* v. *Redhail,* ..... U.S. ....., 98 S.Ct. 673 (1978), N. 9 at 679.

In *Sosna* v. *Iowa,* supra, the Court noted that the certification of a suit as a class action has important consequences for the unnamed members of the class (Footnote 8, 95 S.Ct. at 557) and there held:

> ". . . When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . ." (95 S.Ct. at 557)

However, in at least five "class action" situations, the Court has rejected the claim to legal status of the "class" and has directed dismissal for mootness, where the District Court has either failed to duly certify a class or has expressly declined to certify the class and the nominal plaintiff fails to maintain his personal interest stake in the action. *O'Shea* v. *Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974)

(unconstitutional practices in the administration of criminal justice); *Board of School Commissioners of City of Indianapolis* v. *Jacobs,* 420 U.S. 128, 95 S.Ct. 848 (1975) (unconstitutional interference with news publication); *Baxter* v. *Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551 (1976) (unconstitutional prison disciplinary procedures); *Weinstein* v. *Bradford,* 423 U.S. 147, 96 S.Ct. 347 (1975) (violation of procedural rights in considering eligibility of prisoners for parole); *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697 (1976) (unconstitutional segregation in high schools). Expressions taken from these cases are noted below.

The case most frequently cited is *Board of School Commissioners of the City of Indianapolis* v. *Jacobs,* supra. In this case, a group of school students who were involved in the publication of a student newspaper filed suit alleging that the school board unconstitutionally issued rules which interfered with the publication. The action was filed as a class suit. It was never certified. On appeal, it was determined that the named plaintiffs had graduated. It was held that the graduation caused the case to become moot as to the named plaintiffs and in the absence of due certification by the trial court, the case was completely moot and beyond consideration on appeal for want of jurisdiction. The Court held:

> ". . . Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (95 S.Ct. at 850)

Baxter v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976), was a class action challenge to prison disciplinary proceedings on constitutional grounds. The District Court was said to have treated the suit as a class action but without formal certification. The Court said:

> ". . . Without such certification and identification of the class, the action is not properly a class action. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). . . ." (96 S.Ct. at 1554)

In *Pasadena City Board of Education* v. *Spangler*, supra, the Court again emphasized that absent a formal certification of a class, the case is moot when the named plaintiff no longer has a personal stake in the case, and that this is so despite the fact that the parties informally treated it as a class action and its potential members continued to have an interest in the outcome. The Court said:

> ". . . But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation. Except for the intervention of the United States, we think this case would clearly be moot. Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed. 2d 74 (1975)." (96 S.Ct. at 2702)

It is clear that the filing of a suit as a "class action" does not make it a class action. In *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707 (CA 10, 1973), the Court said:

> "We note in passing that a class action does not exist merely because it is so designated by the pleadings. Cash v. Swifton Land Corp., 434 F.2d 569 (6th Cir., 1970)."

In order to become a class action for purposes of conferring litigant status upon members of the class, it must be first certified. As held in *Kremens* v. *Bartley*, 431 U.S. 119, 97 S.Ct. 1709 (1977)

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

To summarize, this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

Therefore, it follows that the case at bar never became a class action and members of the class never attained a legal status as parties before the Court and did not succeed to the adversary position once held by the nominal plaintiffs.

IV.

The Tender Represented Exercise of a Substantive Lawful Right and May Not Be Disregarded to Create Jurisdiction

By reason of the tender, mootness became a fact as did the non-existence of a continuing live controversy as between any parties before the Court.

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise.

In *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 S.Ct. 448 (1920), the Court said:

> ". . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ." (40 S.Ct. at 449)

In *State of California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893), the Court held that an action was mooted by tender of all sums which could be recovered, despite the refusal of the plaintiff to accept the tender.

To maintain a personal money stake, the plaintiffs' financial interest must be real and direct. *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974). Emotional involvement is not enough to meet the case or controversy requirement. Otherwise, few cases could ever become moot. *Ashcroft* v. *Mattis*, 431 U.S. 171, 97 S.Ct. 1739 (1977).

The Seventh Circuit, in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), was presented with essentially the identical situation on a class action complaint seeking damages for violations of the Securities Exchange Act. After entry of an order declining

to certify the case as a class action, a tender was made and the case was dismissed by order over the plaintiffs' objection. On appeal, plaintiffs sought review of the order declining certification. The Court held that the case was moot and it lacked review jurisdiction. After an in-depth review of recent cases from the Supreme Court, the Seventh Circuit held:

> "When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action." (560 F.2d at 277)

Because of mootness, several other circuits, after analyzing the recent decisions of the Supreme Court, have rejected appeals from denials of class certification in the face of satisfactions of the claims of the named plaintiffs. For example, see *Napier* v. *Gertrude*, 542 F.2d 825 (CA 10, 1976) (release of plaintiff from custody); *Vun Cannon* v. *Breed*, 565 F.2d 1096 (CA 9, 1977) (release from custody); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (CA 2, 1976) (demand by indigent for assignment of counsel in divorce case was met).

In *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. den. sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976), a securities fraud action, the Fifth Circuit affirmed an order dismissing a class action complaint for mootness based upon an order approving a compromise settlement between the defendant and nominal plaintiffs, despite non-involvement of the "class" and the vigorous objections from a potential class member who sought to intervene. The *Pearson* court recognized the effect of a *denial* of certification as effective to strip the case of all class action characteristics[6] and to open the way for disposition of

6. See also Advisory Committee's Notes to Rule 23, cited in the opinion.

the case by a settlement which excluded the uncertified class, and the Court expressly declined to review the class denial for possible error. This case was cited in the Roper opinion but the decision was ignored.

Even in those cases which are of such public significance as to tempt the courts to carve out an exception to the mootness doctrine, this Court has not allowed the fact of mootness to escape the Article III limitation on jurisdiction merely because a satisfaction of the party's demands was by voluntary act of the parties. For example, see *Indiana Employment Security Division* v. *Burney,* 409 U.S. 540, 93 S.Ct. 883 (1973), where the class action was mooted by a full payment of the plaintiff's financial claim to unemployment benefits under the Social Security Act. Also, *Weinstein* v. *Bradford,* 423 U.S. 147, 96 S.Ct. 347 (1975), where the granting of a parole eliminated the plaintiff's grievance against parole procedures alleged to be unconstitutional.

In *Indiana Employment Security Division* v. *Burney,* supra, the Court held:

> "The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit. Though the appellee purports to represent a class of all present and future recipients of unemployment insurance, there are no named representatives of the class except Mrs. Burney, who has been paid. . . ." (93 S.Ct. at 884)

There was nothing wrong about the tender. The defendant simply exercised the traditional right of every defendant who is sued to buy peace. Even then, the tender was first submitted to and approved by the District Court.

(A. 57-61) No effort was made to prevent a ruling on the motion for class certification. The disposition of the litigation by this means harmed no one. The payment in satisfaction of the named plaintiffs did not affect, but carefully preserved, the rights of anyone else who might wish to come forward and assert claims in the future. The dismissal was ordered expressly "without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others." (A. 61) There was no trial or judgment on the merits of the case. There was no res judicata.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the seven months' lapse of time between the denial of class certification and the final order of dismissal afforded ample time.

Rule 23 adds nothing. It does not purport to abolish the substantive right of a defendant to buy peace or the right of a party to be free of federal litigation which is moot for whatever cause. Even if the rule sought to reject these traditional rights, it would have signified nothing, because the Federal Rules of Civil Procedure cannot be used to affect substantive rights, 28 U.S.C., §2072, or to enlarge the jurisdiction of federal courts. *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941).

V.

There Are No Exceptions Which Apply to This Case

One so-called exception to the mootness doctrine may arise where injunctive relief is sought against a continuing

violation of federal law and the violation ceases for one reason or another. If the violation is "capable of repetition, yet evading review", the chance that the plaintiff may again be exposed, if substantial, may prevent his action from being moot. His personal interest stake lies with the right to protection against a threatened repetition. Cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894 (1953); *Sosna* v. *Iowa*, 419 U.S. 393, 95 S.Ct. 553 (1975); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975); *County of Los Angeles* v. *Van Davis*, ... U.S. ....., ... S.Ct. ....., No. 77-1553, 47 Law Week 4317 (March 27, 1979).

Obviously, the case at bar does not fit the pattern of such cases. No injunctive relief is requested. The plaintiffs' only personal interest stake was their individual demand for a money recovery for past alleged overcharges. Indeed, the violation, if any, could not be repeated, because in 1974, the state revised its interest statutes to increase the allowable rate to more than the level complained of in the Complaint.[7] (Add. D, infra). There is not even any evidence to show that the plaintiffs continue to hold bank credit cards.

Another exception is applied by one circuit, but rejected by another, where the claim of the named plaintiffs is satisfied by a tender made during pendency of a motion for certification and before the District Court has had time to rule on the motion.

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7. National banks are entitled to collect a rate equal to that chargeable by the state's "most favored lender". *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 99 S.Ct. 540 (1978), N. 26 at 548; *Fisher* v. *First Nat. Bank of Omaha*, 548 F.2d 255 (1977).

While the view which would preclude a tender to allow for a ruling on a prior motion for certification finds no support in decisions of the Supreme Court, it is mentioned for comparative purposes and to note that the exception, if valid, does not fit the present case.

Notable for this distinction is the ruling of the Seventh Circuit in the very recent case of *Susman* v. *Lincoln American Corp.*, 587 F.2d 866 (CA 7, Oct. 14, 1978), Petition for Certiorari pending, No. 78-1169:

> "We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. . . ." (587 F.2d at 870)

The *Susman* case distinguishes *Winokur* v. *Bell Federal Savings and Loan*, supra, on the factual basis that *Winokur* involved a tender after denial and *Susman* involved a tender while the motion was pending and before the trial judge could rule on the motion.[8]

The Fifth Circuit recognized the same distinction in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), but disregarded it in the case at bar, when holding that the case did not become moot in either event, if the Court of Appeals chose to find error in the denial.

In any event, the present case is quite different. Here, the motion seeking certification was pending for several years and a full record was developed upon all aspects of the class issue and the District Court had every oppor-

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8. The *Susman* Court acknowledged a conflict, saying:

> "We acknowledge the conflict between this decision and that of the Eighth Circuit in Bradley v. Housing Authority of Kansas City, Missouri, 512 F.2d 626 (8th Cir. 1975). . . ."

tunity to rule and did rule elaborately on the motion. (A. 29-47) The tender was made over seven months after the District Court had denied the request for class status. (A. 48-57)

Although not an exception in the strict sense, there are cases which, because of their nature, might tempt a Court to expand the "actual cases and controversies" concept beyond its normal reach in the face of highly important issues which need to be resolved in the public interest. Although the public significance of an issue has not heretofore caused this Court to decide a moot question, such considerations have influenced the lower Courts in some instances to use artificial respiration to keep actions alive in order to address and resolve the great social reform issues of the day. It has been so with the Fifth Circuit, - hence the importance here of making the distinction which should separate the instant commercial type damage suit from the public policy-making decisions of a different dimension.

For purposes of this comparison, reference may be had to a series of decisions of the Fifth Circuit dealing with discrimination in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C., §2000e, et seq. Cf. *Jenkins* v. *United Gas Corp.*, 400 F.2d 29 (1968); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (CA 5, 1970).

In these cases, the Fifth Circuit views a job discrimination suit as "perforce a class action" with "heavy overtones of public interest" and the plaintiff as a "private Attorney General" who takes on the "mantle of the sovereign". The Court in such cases views itself as having a "special responsibility to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position". Once the judicial machinery has been set in train, it is considered that "the proceeding takes on a

public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." In *McArthur* v. *Southern Airways, Inc.*, 556 F.2d 298 (CA 5, 1977)[9] the same Court ruled that a Title VII suit was "presumed to be a proper class suit" and could not be settled except under Subdivision (e) of Rule 23, as in cases where a class is precedently certified.

It is clear from the above cited cases that a "controversy" in Civil Rights actions is being artificially kept alive after it is legally dead under ordinary circumstances, because of the desire of the Court to address and resolve the issue in the public interest, and that traditional definitions of "actual cases or controversies" have been abandoned.

Whether this approach can be squared with Article III in Civil Rights cases is a question for another day. The fact remains that there is no reason to apply the rationale of those cases to the case at bar for the reasons stated below.

Unlike the Civil Rights cases which are quasi-public in nature, the instant case is a purely commercial type lawsuit seeking a money recovery only in behalf of the named plaintiffs. The only thing out of the ordinary about it is the effort, in the plaintiffs' names, to solicit, under the aegis of the Court, some 90,000 potential small claims for litigation in the federal district court, with the constant danger, if not the certainty, that the action will degenerate in practice into multiple lawsuits to be separately tried. The potential members of the class have very little, if anything at all, to gain. The real parties in interest are quite obviously the lawyers appearing for the nominal plaintiffs.

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9. This opinion was vacated en banc on other grounds in *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (CA 5): "That opinion is vacated so as to leave open in this circuit all issues decided here."

There is no evidence of any real interest in the litigation from card holders in the putative class. There is no significant public interest involved. Instead, the aggregation of usury claims in the class action format violates the articulated public policy of the state and is viewed and condemned on the state level as a legal fraud.[10] The fact that there were no violations of underlying state policy related to permissible service charges is underscored by the fact that Mississippi has legislatively endorsed and allowed to be collected the very same service charges which are claimed here to be usurious[11] and has made its laws on this score retroactive.[12] There is no overwhelming federal social policy involved. No injunctive relief is sought or available. In brief, even if policy consideration could change the requirements of Article III of the Constitution, there are no circumstances present here which might serve

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10. See *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561 (1941), and *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (Miss., 1974). Cf. Point II, pp. 19-21, Petition for Writ of Certiorari, this Case No. 78-904; Opinion of the U. S. District Court. (A. 29-47) The District Court concluded:

> "Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the 'fair' adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a 'legal fraud' by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud." (See Opinion, A. 45-46. Cf. same Opinion at A. 43-44)

11. Miss. Code 1972 §75-17-1. (Add. D, infra) In 1974, Mississippi revised and modernized its interest statutes, allowing contractual service and interest charges ranging from 10% to 36% and specifically allowing a rate of 18% per annum on revolving charge accounts and bank credit cards. These provisions inure to the benefit of National Banks under their "most favored lender" status. *Fisher* v. *First Nat. Bank of Omaha*, 548 F.2d 255 (CA 8, 1977); *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 99 S.Ct. 540 (1978), N. 26, p. 548.

12. Miss. Code 1972, §75-17-17 (Add. D, page 46, infra); *Cappaert* v. *Burman*, 339 So.2d 1355 (Miss. 1976).

as a temptation to broaden the traditional concept of a case or controversy for jurisdictional purposes.

A final exception has been recognized which serves to open the door of the trial court to post judgment interventions, provided the interventions are timely. In this situation, a member of the rejected class in a Title VII suit has been allowed to intervene after a decision denying class certification for the purpose of appealing the adverse class determination order. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977).

To what extent the quasi-public nature of the cited case may have influenced the Court's indulgence is not indicated in the opinion, but the exception, if such it is, has no application here, because no one asked leave to intervene in the case for purposes of appeal or otherwise, and there was no party to the appeal who maintained a live controversy with the defendant. Indeed, the very existence of the exception underscores the fact of mootness when, as here, there is no intervention by one retaining a live controversy.

DISCUSSION OF OPINION BELOW

As previously noted, the decision is in direct conflict with the Seventh Circuit's decision in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1977), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), and with its own prior decision in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), cert. denied sub nom., 425 U.S. 912, 96 S.Ct. 1508 (1976), yet neither case is acknowledged as being in conflict. *Winokur* is not mentioned and *Pearson* is miscited to a statement which is clearly and directly contradictory to what the Court had held.

Also, as previously noted, the decision conflicts with at least five decisions of this Court, these being *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975); *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976); *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975); and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976).

Significantly, not one of the cases from this Court was even mentioned in the opinion of the Fifth Circuit.

The central theme of the decision of the Court of Appeals is contained in this language from the opinion:

> ". . . By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.
>
> "Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. . . ."

As emphasized previously, this is a commercial type lawsuit seeking only money and there is no community of interest among the 90,000 card holders. The would-be class representative is not a federal private Attorney General charged with the obligation to serve the public interest. Contrary to its own express holding in *Pearson*, the Court ignores the difference between a class action and a non-

class action and places undeserved emphasis upon mere allegations of class action status rather than upon due certification.

Since the District Court declined to grant class action status, the case was stripped of its character as a class action, even if it could have qualified upon the basis of a mere allegation in the Complaint. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977), the Court adopted the Advisory Committee's note, holding:

> ". . . To be sure, the case was 'stripped of its character as a class action' upon denial of certification by the District Court. Advisory Committee's Note on the 1966 Amendments to Rule 23, 28 U.S.C.App., p. 7767. . . ." (97 S.Ct. at 2469)

It was explicitly so held in *Pearson*, supra, but the Court ignored the admonition on the view that the self-styled class representative continued to have responsibilities to the uncertified class after certification was denied. Indeed, the "duties" to the unnamed and nameless members of the putative class were found to be incapable of termination by satisfaction, whether with their acquiescence or over their objection, short of an appeal from the class denial and an affirmance on review.

The view that the mere filing of a damage action as a class action makes it such and projects duties to the unknown members of a putative class which prevents termination of the action by satisfaction or dismissal without appeal simply rewrites Rule 23 and requires that every case involving class action allegations will have to be tried on its merits in the District Court and reviewed on appeal before an end can be brought to the action. The adverse impact of such a decision upon both litigants and courts should be obvious.

No such court-imposed "duty" to continue litigation after the personal interest stake has been lost has ever heretofore been considered as a substitute for the personal stake required for Article III jurisdiction.

Finally, the Fifth Circuit refers to the "special responsibilities" which the Court has to insure that a dismissal "does not prejudice putative members". But the Court fails to suggest how the dismissal in the case at bar can serve to prejudice putative members. Indeed, the dismissal order very carefully provides that the dismissal is without prejudice (A. 61), and no prejudice is apparent, since those individuals retained the very same rights which they always had, including the option to sue or stay out of Court according to their own desires.

The Court argues that the nominal plaintiffs would "maintain a nexus" with the class, despite satisfaction of their own claims. But the Court does not explain or define the "nexus" and its existence is not apparent.

Even so, a "nexus", whatever else that may be, is not the same as a personal interest stake in the outcome of the litigation. The plaintiffs have no such personal stake. The "class" has no legal status, even if one or more of its members were aggrieved and were potential parties. Standing in the jurisdictional sense cannot exist without a continuing real personal stake in the outcome of the litigation. The only ones left with a personal interest stake are the lawyers for the plaintiffs who seek the court's aid to solicit others to become parties. They are not parties themselves and cannot supply the missing jurisdiction.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals should be vacated with directions to dismiss the appeal and reinstate the dismissal judgment of the District Court.

Respectfully submitted,

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ADDENDUM

ADDENDUM A

UNITED STATES CONSTITUTION

Article III.—The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ADDENDUM B

12 U.S.C. § 85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub.L. 93-501, Title II, § 201, 88 Stat. 1558.

ADDENDUM C

12 U.S.C. § 86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198.

ADDENDUM D

MISSISSIPPI CODE OF 1972

CHAPTER 17

Interest

§ 75-17-1. Legal rates of interest and finance charges.

(1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof;

and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two hundred fifty thousand dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed two hundred fifty thousand dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of eight hundred dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1¼%) per month to that portion of the applicable balance which is in excess of eight hundred dollars ($800.00) but not greater than twelve hundred dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds twelve hundred dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than six hundred dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of six hundred dollars ($600.00) but not greater than eighteen hundred dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of eighteen hundred dollars ($1800.00) but not greater than forty-five hundred dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of forty-five hundred dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This paragraph (7) does not limit or restrict the manner of contracting for the finance charge whether by way of add-on discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed one thousand dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than one thousand dollars ($1,000.00) but does not exceed two thousand five hundred dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than two thousand five hundred dollars ($2,500.00).

(9) The term "finance charge" as used in this section and in sections 75-17-13, through 75-17-17, 63-17-13, 75-67-127 and 75-67-217 means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, arranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this section and sections 75-17-13 through 75-17-17, 63-17-13, 75-67-127 and 75-67-217, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this section shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

SOURCES: Laws, 1972, ch. 436, § 1; 1973, ch. 387, § 1; 1974, ch. 564, § 1, eff from and after July 1, 1974, eff from and after passage (approved March 27, 1973).

§ 75-17-17. Law governing loans made or credit extended prior to July 1, 1974.

Loans made and credit extended prior to July 1, 1974 shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to July 1, 1974 shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after July 1, 1974 shall conform with the provisions of sections 63-17-13, 75-17-1, 75-17-13 through 75-17-17, 75-67-127 and 75-67-217.

SOURCES: Laws, 1974, ch. 564 § 7, eff from and after July 1, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
Petitioner,

vs.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

The Petition of Deposit Guaranty National Bank (hereinafter "the bank") as originally filed sought review as to seven questions dealing with mootness, the substantive law of Mississippi, the status of national banks, and the certifiability of the action as a class action. This Court has granted the writ of certiorari only as to the mootness questions.

QUESTIONS PRESENTED FOR REVIEW

I.

May a defendant by his voluntary tender of individual damages to a named plaintiff thwart or evade appellate review of an erroneous refusal of class certification pursued by the plaintiff as class representative?

II.

Is the issue sought to be asserted by the named plaintiff on behalf of the class, after attempted deliberate mootness by the defendant of his individual claim, one which will evade review unless the correction of the erroneous refusal to certify can be said to relate back to either commencement of the action or the initial denial of the motion for certification.

III.

Does a named plaintiff to whom a tender has been made of the amount of his individual claim nonetheless maintain under the facts of this case a sufficient personal interest stake to prosecute an appeal of an erroneous refusal to certify a class.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS

Art. I, §8, U.S. Constitution:

> "The Congress shall have power . . . (t)o constitute tribunals inferior to the supreme court. . . ."

28 U.S.C. §1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The named plaintiffs (hereinafter, "the cardholders") first note the irrelevance of several segments of the bank's statement of the case which appear to be a transparent attempt to re-submit the numerous questions presented in its petition for certiorari which this Court has previously declined to consider.

At the time of the entry of the order by the District Court denying certification the cardholders sought to obtain review by interlocutory appeal. This effort was successfully resisted by the bank. The seven months' interval referred to at several places in the bank's brief embraced this activity.

The bank points to the absence of intervenors prior to the service and filing of its offer of judgment. This offer was made while the cardholders' motion for summary judgment was pending. Contrary to Rule 68, the bank's offer was filed with the court. The cardholders responded with a counter-offer of judgment which was served on the bank and a copy of which is attached as an addendum. The counter-offer expressly recognized the right to review the class-wide claim for relief. This offer was declined by the bank. This record of disinclination to protect the rights of the absent class member is wholly inconsistent with the bank's present concern over absence of intervenors.

The objection to the tender of the bank was made by the cardholders through their lawyers. The bank's statement that the lawyers, rather than the cardholders, lodged the objection is wholly unsupportable.

The statement that the cardholders received everything claimed in the complaint (Brief of Bank, p. 5) ignores the cardholders' representative claim. The contents of phraseology of the Notice of Appeal were never mentioned by the bank in the Court of Appeals.

There is no complete loss of all personal financial interest by the named plaintiffs. The cardholders have a continuing stake by reason of the prospect for spreading of expenses along with the prospect for recoupment of costs of notice which they have agreed to underwrite.

SUMMARY OF ARGUMENT

The cardholders have presented this Court with the requisite concrete adverseness in a form historically considered as capable of resolution through the judicial process. See, *Flast* v. *Cohen*, 392 U.S. 83 (1968), cert. denied, 393 U.S. 940.

The cardholders had standing at the commencement of this action and at the time of denial of certification. Prudential limitations on the exercise of federal jurisdiction do not apply to cardholders' statutory cause of action for money damages. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

This Court has already recognized cardholders' right to appeal in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978). The right to appeal is a logical by-product of this Court's refusal to permit interlocutory appeals of orders denying certification. See, e.g., *Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978).

Mootness presupposes a standing which existed at the outset but which is no longer present. The general rules governing mootness were first announced in cases not dealing with the issue in the context of a class action. These rules recognize mootness to exist only when the controversy can be said with assurance not to be expected reasonably to recur and, further, interim events have completely eradicated the effects of the violation. *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642, 649 (1979). An escape from mootness exists when the challenged action is capable of repetition yet evading review. *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911). Voluntary cessation of illegal conduct does not make a case moot. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953). Mootness

exists only when all the issues in a proceeding are no longer live. *Powell* v. *McCormack*, 395 U.S. 436 (1969). The presence of an injury which is capable of repetition yet evading review may avoid mootness but it is not an essential ingredient of satisfaction of the Article III minima for a case or controversy. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

In the context of a class action, certain mootness rules have been announced by this Court in cases which are distinguishable because the right to class action treatment was not a litigated issue. These general rules governing mootness in the class action context recognize satisfaction of Article III minima when a named plaintiff's claim has become moot before the District Court can reasonably expect it to certify a class and, under such circumstances, the certification is deemed to relate back to the commencement of the action. *Sosna* v. *State of Iowa*, 419 U.S. 393 (1975). A certification of a class by a District Court is not treated by this Court as an accomplished fact and an improper certification will be set aside. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The cardholders have a federal statutory (28 U.S.C. §1291) right to review a final decision of a District Court of the United States and that review includes the right to seek review of a denial of a claim advanced in a representative capacity for class action treatment. The alleged mootness of the individual claims of the cardholders is but one of two issues advanced by the cardholders in this case and, consequently, the right to proceed as a class, a litigated issue subject to the right of appeal, remains a live claim in the case. Because of the restrictions on interlocutory appeals from denials of class certification (*Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 LEd. 2d 351 (1978)), any error of law by the trial court would go uncorrected if the case must be dismissed when a repre-

sentative's claim becomes moot after erroneous refusal to certify (*Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (5th Cir. 1978), vacating, 557 F. 2d 414 (5th Cir. 1977)).

In a context of an action for money damages where the defendant has tendered sums claimed by the named plaintiff after a refusal of certification and after the bar of the statute of limitations, it can be fairly said that the class-wide issue will evade review if mootness is found and, under such circumstances, the reversal of the class action determination by the Court of Appeals should be deemed to relate back to the time of the commencement of the action or the time of the entry of the erroneous order denying certification. The concept of the transitory nature of the cause of action, the historical context for relation back, should include the unavoidable lapse of time involved in the appellate review process where the so-called mooting event is nothing but the pay-off of part of a claim and evasion of review of the class-wide issue will otherwise result.

The cardholders have a personal interest stake in the controversy by reason of the prospect for spreading of generally non-taxable expense items and by reason of their status as fiduciary representatives of the class.

The public policy of the United States demands that the defendant be required to answer to the claims of the class. The gravamen of the cardholders' claim is violation of a federal statute, 12 U.S.C. §§85, 86. The bank's condemnation of Rule 23 is unfounded and misguided. *A. Miller, An Overview of Federal Class Actions; Past, Present and Future* (Federal Judicial Center, 1977). The utility of Rule 23 would be substantially eviscerated by an embrace of the mootness concept urged upon this Court by the bank. The prejudice to the putative class members is obvious when one considers the fact that if this case is moot, the statute of limitations will have run against

all of the claims of the class members (*American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974)) notwithstanding the fact that they have properly relied upon the prosecution of this appeal by the cardholders (*United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978)). The cardholders satisfy the requirement of having a "legally cognizable interest" in the final determination of the underlying questions of fact and law. *County of Los Angeles* v. *Davis, supra.*

The question of mootness in a class action context has been treated in the various circuits and only the Seventh and Ninth Circuits read the *Sosna* line of cases so as to require a class in fact certified at the appellate level (*Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978); *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (9th Cir. 1977)) as opposed to a class which is properly certifiable (*Geraghty* v. *U.S. Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978)) in order to satisfy Article III minima when confronted with the mootness of the named plaintiff's claim.

The judgment in all respects is due to be affirmed.

ARGUMENT

I.

The Policy Bases for Article III "Case or Controversy"

This Court has often noted that "the focus upon the plaintiff's stake in the outcome of the issue he seeks to have adjudicated serves a separate and equally important function bearing upon the nature of the judicial process." *Simon* v. *Eastern Kentucky Welfare Rights Organization,*

426 U.S. 26, 38, n. 16 (1976). A significant personal stake serves "to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). The questions must be presented "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 755 (1976); *Flast* v. *Cohen,* 392 U.S. 83 (1968).

The mere fact that adverse parties desire a decision on the merits does not compel this Court to respond on the merits as was stated in *Kremens* v. *Bartley,* 431 U.S. 119, 134, n. 15 (1977), a case involving an effort to resolve issues of constitutional law. However, in the instant case, the sole issue before this Court is mootness in the context of a charge of violation of a federal statute and, although the bank sees the case as moot, the cardholders continue to supply yet another level of the federal judicial system with what we respectfully submit constitutes the necessary "concrete adverseness" in opposition to the bank's view.

II.

The Cardholders Had Standing at Commencement of the Action and at the Denial of Certification

The cardholders claimed damages in their individual capacity for usurious interest charges in violation of 12 U.S.C. §§85, 86, the National Banking Act. The initial analysis must begin with their status at the time that they commenced an action claiming damages both as individuals and as members of a class. The threshold inquiry then deals with their standing at that time.

The constitutional limits on standing eliminate claims in which the plaintiffs have failed to make out a case

or controversy between themselves and the defendant. *Gladstone Realtors* v. *Village of Bellwood,* ..... U.S. ..... (April 7, 1979). The cardholders made a clear showing in their complaint that they personally had suffered actual damage as a result of illegal activity of the defendant. It is an indisputable fact that the strength of their allegations led to an offer of judgment by the bank, albeit without prejudice. A showing of injury as a result of illegal conduct by a defendant satisfies Article III of the Constitution. *Gladstone Realtors* v. *Village of Bellwood, supra; Duke Power Co.* v. *Carolina Environmental Study Group,* ..... U.S. ....., 98 S.Ct. 2620, 2630 (1978); *Arlington Heights* v. *Metropolitan Development Housing Corp.,* 429 U.S. 252, 260-261 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975); *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 (1973). A case or controversy thus clearly existed at the commencement of the action in 1972 and on September 29, 1975, the date upon which the District Court declined to certify a class. In fact, the bank has never challenged the cardholders' standing at these two critical points.

III.

Effect of Prudential Limitations on the Exercise of Federal Jurisdiction

Although this Court recognizes prudential limitations upon the exercise of federal judicial power, such restraint appears to be more appropriately applicable to cases in which a constitutional question of broad social import is tendered by a claimant having no greater injury than all or at least a large class of other citizens. *Gladstone Realtors, supra, Warth* v. *Seldin, supra* at 499. The instant action is grounded upon violation of a federal statute (12 U.S.C. §§85, 86) by a private party rather than constitutional rights and, in such an instance, the prudential limita-

tions that overlay Article III requirements have not been applied as an obstacle to the exercise of federal jurisdiction. See, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). We respectfully submit that the record clearly supports satisfaction of the Article III minima and that non-constitutional limitations on standing are inapplicable to the cardholders' claims.

IV.

This Court Has Already Resolved This Issue in Cardholders' Favor

Before any detailed analysis of mootness and class actions, we submit that this Court has already resolved the mootness issue in cardholders' favor. In *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978) the District Court refused to certify a class and there followed an agreement between the named plaintiffs and the defendant on their individual claims and a judgment of dismissal. The named plaintiffs did not appeal and a member of the class sought to intervene within the applicable time period for the taking of an appeal. Upon denial of intervention, the intervenor appealed and obtained permission to intervene as well as an order compelling the certification of a class. This Court held that the intervenor's application was timely filed.

The issue before this Court in *McDonald, supra*, was the timeliness of the application for intervention, the defendant taking the view that the time began to run at the denial of class certification and not at the time of the entry of final judgment. In commenting upon the status of the named plaintiffs, this Court observed that *while a denial of certification does strip a case of its character as a class action, it does not follow from such a proposition that the case must be treated as if there*

never had been an action brought on behalf of absent class members. United Airlines, Inc. v. *McDonald*, 432 U.S. 385, 393 (1977), reh. denied, 434 U.S. 989 (1978). Then, this Court made the very clear pronouncement:

> "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes." *McDonald, supra* at 393. *Accord, Gardner* v. *Westinghouse Broadcasting Co.*, ... U.S. ....., 57 L.Ed. 2d 364, 368 (1978).

The dissent in *McDonald, supra*, took issue with this statement contending that the concession of United recognized the plaintiff's right to appeal the denial of class status only if the plaintiffs had chosen to litigate the case to a final judgment rather than to settle it. *McDonald, supra* at 400.

The basis for refusal to permit interlocutory appeals of orders denying class certification of necessity proceeds on the premise that a named plaintiff can seek review of the denial of certification, even after a judgment in his favor. See the concurring opinion of Chief Judge Seitz in *Gardner* v. *Westinghouse Broadcasting Co.*, 559 F. 2d 209, 214 (3rd Cir. 1977), affirmed, ... U.S. ....., 98 S.Ct. 2451 (1978). See, also, *Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978).

The instant case presents the situation of a judgment based on a tender to the named plaintiffs without an embrace of the tender by them so that it can be fairly stated that the named plaintiffs have not "settled". Nonetheless, the named plaintiffs here have no less stake than the named plaintiffs in *McDonald* would have had if they had perfected the appeal which this Court expressly recognized that they could do. Thus, no basis exists for a different conclusion as to the named cardholders in the instant case.

V.

The Doctrine of Mootness

A. Introductory Note

Mootness has been aptly described as a time dimension of standing. 13 *C. Wright, J. Miller & E. Cooper, Federal Practice and Procedure*, §3533, p. 266 (1975). The bank's challenge is grounded upon an alleged mootness of the cardholders' individual claims after denial of class certification. The cardholders do not concede their lack of individual stake. However, the cardholders contend that this entire action is not mooted even if the assumption is made for argument's sake that the cardholders' individual claims became moot after the erroneous denial of certification. The description of the denial of certification as erroneous is based upon the Court of Appeals' characterization of this case as a "classic case for a Rule 23(b)(3) class action"[1] and the scope of this Court's order granting the petition for certiorari.[2] Analysis of the applicability of mootness to this case should begin with a statement of the rule in the context where it historically arose—in actions presenting no Article III problems solely on account of the action's status as a class action.

B. Mootness in Other Than a Class Action Context

The general rules governing mootness, independent of issues peculiar to class actions, were recently discussed by this Court in *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642 (1979), an action commenced as a class action. However, the mootness defect was there

1. Opinion below, App. p. 79.

2. The Court's review by certiorari has been limited to the mootness question. The petitioner's questions dealing with the Court of Appeals reversal of the certification order were not accepted for review.

found to permeate the entire class and was not peculiar to a disability of the class representative. In *Davis*, mootness was defined as follows:

> " 'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)." *Davis, supra* at 649.

A post-suit change of heart has never been an ample basis for a finding of mootness. To the contrary, this Court in *Davis* reiterated that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal power to hear and determine the case, *i.e.*, does not make the case moot." *Davis, supra* at 649; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). The general rule governing abatement of an action by mootness was stated in *Davis* as follows:

> "But jurisdiction, properly acquired, may abate if the case becomes moot because
>
> (1) it can be said with assurance that 'there is no reasonable expectation. . .' that the alleged violation will recur, see *id.* at 633, see also *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972), and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973).
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.
>
> The burden of demonstrating mootness 'is a heavy one.' " *Davis, supra* at 649.

An additional general rule in the area of mootness deserves mention. An avoidance of mootness has been recognized where action, particularly governmental, has been shown to be "capable of repetition, yet evading review." The rule stems from an action where there was a likelihood of recurring injury from short term orders of the Interstate Commerce Commission which would be issued in the future and would have a similar effect on the plaintiff (*Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911)) and, like other mootness rules, has its roots in claims for injunctive relief in other than a class action context.

Finally, where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969).

C. Mootness Problems Peculiar to Class Actions

General concepts of mootness have been brought to bear in class actions where a mootness challenge has been made by reason of an asserted difference in position of the representative and the members of the putative class. In the wake of the variety of class action mootness cases reaching this Court certain rules have evolved.

There must be a named plaintiff who satisfies Article III minima at commencement of the action and at the time of certification but the Article III requirement can be met by the existence of a class in controversy with the defendant although the claim of the class representative has become moot. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). The class must be "duly certified" before the *Sosna* rule comes into play. *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128 (1975). However, when a named plaintiff's claim by its very temporal nature will become moot before the District Court can reasonably be

expected to certify the class, there can still be an Article III case or controversy because the certification "relates back" to the commencement of the action. This is particularly appropriate where "otherwise the issue would evade review". *Sosna, supra* at 402, n. 11; *Swisher* v. *Brady*, ... U.S. ....., 57 L.Ed. 2d 705, 714, n. 11 (1978); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The District Court's certification of a class is not treated by this Court as an accomplished fact. *Kremens* v. *Bartley*, 431 U.S. 119, 130 (1977). An improper certification will be set aside. *Jacobs, supra; Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

The necessity for the presence of an injury which is "capable of repetition, yet evading review" is an aspect of prudential limitation on the exercise of federal judicial power in the realm of constitutional rights and is not an essential ingredient of every Article III case or controversy. In cases within federal jurisdiction which otherwise satisfy Article III minima but which do not involve such an issue, the *Sosna* rule of avoidance of mootness can nonetheless be applied. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); see, also, *Gladstone Realtors* v. *Village of Bellwood*, ... U.S. ..... (April 7, 1979).

VI.

The Distinguishing Difference Between the Instant Case and Other Class Action Mootness Cases

The rules governing mootness in class actions have all arisen in cases before this Court where the right to proceed as a class action was not a litigated issue in the case, separate and apart from the merits claims. Specifically, examples include *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (certification granted based upon a stipulation); *Gerstein* v. *Pugh*,

420 U.S. 103 (1975) (District Court certified the class and even though plaintiff's claims may have been moot at the time of certification, the certification related back to the time of the filing of the complaint, the fact of certification not at issue on appeal); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (District Court certified class action; no appellate issue raised in connection therewith); *Zebloki* v. *Redhale*, 434 U.S. 374 (1978) (District Court certified class, defendant failed to file a brief in opposition to certification, no appellate issue raised with regard to certification); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (no class ever certified, plaintiffs lacked standing at the time of the commencement of the action, appellate issue dealt with plaintiffs' right to relief); *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, 420 U.S. 128 (1975) (class improperly certified, decertification ordered on this Court's own motion); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) (District Court treated case as a class action but failed to certify, defect raised by this Court on its own motion on appeal); *Winestein* v. *Bradford*, 423 U.S. 147 (1975) (plaintiff lost in District Court on merits, class not certified, no apparent appellate issue as to denial of class certification); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) (class not certified, appeal dealt only with the merit of the plaintiff's claim); and *Kremens* v. *Bartley*, 431 U.S. 119 (1977) (class certified in the District Court, propriety of certification raised by this Court on its own motion).

The bank's attempt to read into these rules the absolute requirement of a properly certified class as a condition precedent to review of other issues therefore takes these cases well beyond their proper context because the right to proceed as a class was not before this Court as a live issue in any of the *Sosna* line of cases.

We note in passing that in *Ihrke* v. *Northern States Power Company*, 409 U.S. 815 (1972) this Court in a memorandum opinion granted certiorari and vacated the judgment of the Court of Appeals (459 F. 2d 566 (8th Cir. 1972)) with instructions to dismiss the case as moot. In *Ihrke* the mootness of the individual claims coupled with a denial of certification compelled this Court's conclusion of dismissal for mootness because the certification question, although a litigated issue in the case, had been resolved *against* the class by the Court of Appeals and the judgment had been, in that respect, affirmed. Of course, in the instant case, the Court of Appeals resolved the certification question *in favor of* the class and this Court's action on the bank's petition for certiorari was limited to issues other than the reversal of the refusal to certify.

While further discussion of *Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on petition for rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978) appears later, the following quotation from a law review article dealing with *Winokur* emphasizes the distinction between the instant case and the previous class action mootness cases:

> "In the *Sosna* line of cases, the named plaintiffs were appealing a single issue common to themselves and their represented class: the substantive merit of the litigation they had brought. In such cases, mooting of the individual claims would, under a strict justiciability standard, lead to the mooting of the class's claims. This situation is very different from the one in *Winokur*, where the court was faced with named plaintiffs appealing two issues: the mootness of their individual claims and the district court's denial of class certification. *Even if the mooting of the individual claims were upheld and the court prevented from exercising jurisdiction over the named plaintiffs and their*

represented class's substantive claims, the procedural issue of class certification would have remained. In light of the well-established rules that the mooting of one of a plaintiff's claims does not require the mooting of his other claims and that each claim must be tested for mootness individually, the class certification issue should not have been mooted by the mooting of the named plaintiff's 10b-5 claims. Its survival should have maintained appellate jurisdiction in the circuit court of appeals. Had the appellate court found the district court's denial of class certification improper, it could have remanded to the district court, ordering certification of the class and continuation of the suit limited to the merits of the class's claims." *Note, Winokur* v. *Bell Federal Savings & Loan Association: An Overly Restrictive Application of the Mootness Doctrine in a Class Action Setting,* 72 Northwestern L. Rev. 811, 816-17 (1978). Emphasis added.

Historically, where the mootness claim affected the merit of the entire claim presented in the case, an adverse ruling by a trial court determining the action to be moot was subject to appellate review. Put another way, a district court's determination of mootness did not oust the appellate court of jurisdiction. See, e.g., *Vun Cannon* v. *Breed,* 565 F. 2d 1096 (9th Cir. 1977). Any other rule would have disregarded the constitutional grant of authority to Congress to create tribunals inferior to this Court at Article I, §8, and the statutory response thereto at 28 U.S.C. §1291 in which appellate jurisdiction is vested in the United States Courts of Appeals for review of all final decisions of the district courts of the United States. This Court's previous cases dealing with mootness in class actions must therefore be evaluated in light of the federally created right to review a refusal of certification when it is a litigated issue in the case.

VII.

This Action Is Not Moot Because the Right to Class Certification Was a Litigated Issue in This Case and the Issue As to the Cardholders Would Evade Review If Mootness Is Found

A. Certification As a Litigated Issue

The bank's theory of mootness depends upon this Court's acceptance of the denial of the certification by the District Court as an *ipse dixit,* insulated from judicial review. Of course, such action would deprive the litigant of his federally created right to review a decision of a District Court of the United States as is set forth at 28 U.S.C. §1291.

This action was commenced by the cardholders on two claims. First, they sued the bank as individuals; second, they sued the bank as representatives of a class composed of other cardholders. The first claim to be treated by the District Court was the cardholders' representative claim and it was disposed of adversely to them by the District Court's denial of certification. Of course, this ruling occurred prior to any consideration of the claims of statutory violation on the merits. The bank then successfully opposed cardholders' attempt to obtain interlocutory review. Shortly after the refusal of the court of appeals to accept review of the interlocutory certification order, and while the cardholders' motion for summary judgment was pending, the bank tendered sums due to the named plaintiffs under the claims made in their individual capacity. A judgment was thereafter entered on this tender over the cardholders' objection. On appeal by the cardholders, the bank sought to have the case dismissed on the ground of mootness by the filing of a motion to dismiss the appeal.

As was expressed in the law review article quoted earlier, mootness is found only upon an analysis of *all* the issues presented in the case and "where one of the several issues becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969). Hence the bank's fact of mootness on appeal is based entirely upon the acceptance of the bank's contention on the litigated issue of class certification. This case presents the situation where, after an appropriate certification hearing the Court through no fault of the named plaintiffs, improperly denied certification. In addressing such a situation, the Fifth Circuit has stated in *Satterwhite* v. *City of Greenville*, 578 F. 2d 987, 995 (5th Cir. 1978), vacating, 557 F. 2d 414 (5th Cir. 1977) ". . . because of the restrictions on interlocutory appeals from class certification denials . . . (citations omitted), the error of law by the trial court will go uncorrected if the case is dismissed when the representatives' claim becomes moot." The recent decisions of this Court (*Coopers & Lybrand* v. *Livesay*, ... U.S. ....., 57 L.Ed. 2d 351 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.*, ... U.S. ....., 57 L.Ed. 2d 364 (1978)) disallowing interlocutory review in class actions set the certification procedure in motion down the dead-end street of no judicial review if mootness is found to attach under these circumstances.

Obviously, the fact of a refusal to certify is critical to the bank's theory. The significance that this Court attaches to the mere fact of certification by a District Court was squarely addressed in *Kremens* v. *Bartley*, 431 U.S. 119, 130 (1977), where it was stated that "we have never adopted a flat rule that the mere fact of certification of a class by a District Court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become

moot." Prior to *Kremens*, this Court had taken action consistent with this principle in *Board of School Commissioners of City of Indianapolis* v. *Jacobs*, *supra*, and *Baxter* v. *Palmigiano*, *supra*. Thus, only a "properly certified" class may succeed to the adversary position of a named representative whose claim becomes moot. *Jacobs*, *supra*. We consider it to be consistent with this reasoning to conclude that the mere fact of an erroneous denial of certification of a class by a District Court is not sufficient to require this Court to decline to decide the merits of the claims of the class who plaintiff has sought to represent. We respectfully submit that the result in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978), as previously mentioned, is simply a logical, although not expressly articulated, application of this view.

The cardholders' theory of avoidance of mootness by reliance upon the right to review a litigated issue removes this case from the direct influence of cases dealing specifically with satisfaction of Art. III minima in a class action context. The case is therefore governed by general mootness concepts. Under *Powell* v. *McCormack*, *supra*, as earlier argued, mootness must reach *all* claims. Here the bank's tender clearly is inadequate and a mootness would occur only upon the tender of all of the relief prayed for by the cardholders, both as individuals and as representatives of the class. The bank simply cannot, on this record, satisfy the second prong of the test of *County of Los Angeles* v. *Davis*, *supra*, that "interim relief or events have *completely* or irrevocably eradicated the effects of the alleged violation." Emphasis added.

The bank gamely tries to legitimate its tender of not half a loaf, but a crumb. Brief of Bank, pp. 20-23. The bank states that "no effort was made to prevent a ruling on the motion for class certification". Brief of Bank, p.

23. The bank's magnanimous recognition of the cardholders' right to a hearing in District Court leaves unstated the fact of the bank's vigorous opposition to cardholders' attempt to obtain interlocutory review and, now, review after judgment. The bank states that "there was nothing wrong about the tender". Brief of Bank, p. 22. We respectfully disagree. The tender was an incomplete offer of the relief prayed for in the complaint and, as such, was nothing more than mere gimmickry calculated to eviscerate Rule 23 and designed to obtain a construction thereof wholly inconsistent with the Rule 1 mandate for a construction sympathetic with the *just* determination of every action. Frankly, we consider such tactics in the defense of this action to fall precisely within the contours of the bad faith, vexatious, wanton or oppressive conduct referred to by this Court in *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975) and *Vaughan* v. *Atkinson*, 369 U.S. 529 (1962).

The cardholders' appeal is not moot but is a live controversy based upon the federally created right (28 U.S.C. §1291) to review an adverse decision of a District Court.

B. Evasion of Review

The bank in its brief recognizes that prior certification may prevent the action from becoming moot when the plaintiff ceases to maintain a personal interest stake, so long as a live controversy remains as between members of the certified class and the defendant. Brief of Bank, p. 16. The bank thus pins its hopes on a literal reading of the following from *Sosna*:

> ". . . There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23,[11] but there must be a live controversy at the time this Court reviews the case." *Sosna, supra* at 402.

Speaking to this very observation, Judge Friendly observed in *Frost* v. *Weinberger*, 515 F. 2d 57, 64 (2d Cir. 1975), cert. denied, 424 U.S. 958, as follows:

> "But the apparent force of what was said there (in *Sosna*) in text is largely drained by footnote 11, which seems to read directly on this case."

Footnote 11 of *Sosna* permits certification to relate back where the transitory nature of the claim is such that "otherwise the issue would evade review." The seminal "capable of repetition, yet evading review" standard, born in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), has come to carry a modern connotation as a means to justify exercise of federal judicial power in the constitutional field when the injury complained of can be so described. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

The exclusion of the phrase "capable of repetition" from footnote 11 is significant because it implies that the applicability of the standard in certain contexts may not depend entirely on the presence of a recurrent fact pattern but upon the likelihood of preclusion of judicial review of allegedly illegal conduct. In an action such as in the instant case, a claim for money damages rather than for injunctive relief, the "capable of repetition" feature of the old *Southern Pacific Terminal Company* test seems less relevant.

Here, the bank has the burden of showing mootness. *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642 (1979). Of course, a self-serving statement of disinclination to charge usurious interest in the future, while not presently in the record, could easily be made in an

effort to defeat applicability of the "capable of repetition" aspect of the doctrine by which mootness is avoided. However, that overlooks the real question of whether the class-wide issue will evade review if mootness is found, thereby enabling the bank to keep its windfall. The plain answer is that there would be no possibility of class-wide relief if the case has been moot as to the class since June of 1976, as the bank contends, because the statute of limitations may well have long since run under the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974).[3]

Class members who have relied on the named cardholders' pursuit of their rights could nonetheless be foreclosed from any relief, notwithstanding the fact this Court has already recognized the right of a class member to rely on the named plaintiff to appeal the class issues in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977), reh. denied, 434 U.S. 989 (1978). If the certification is not permitted to "relate back" no clearer case can be made out for applicability of the footnote 11 standard—"the reality of the claim that otherwise the issue would evade review." Consequently, the import of footnote 11 in *Sosna* should apply when the controversy becomes moot as to the named plaintiffs before the appellate court can reasonably be expected to rule on an appeal from an erroneous order denying a certification motion. The conclusion is even more warranted where, as here, the asserted mooting is nothing more than a payoff only of the representative in an action claiming class-wide money damages, rather than injunctive relief. The applicability of the test of issue evasion in deliberate mootness problems has been suggested in 13 *C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure*, §3533, p. 171 (1978 pocket part).

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3. These actions are governed by a statute of limitations of two years. 12 U.S.C. §86.

VIII.

The Effect of Public Policy Upon the Questions Presented

The bank, with little effort to disguise its contempt for a duly promulgated rule of this Court, seeks to minimize the effect of the public interest at stake in this proceeding. The bank argues that there is "no significant public interest involved". Brief of Bank, p. 28. We first point out that we consider the charge of a violation of federal statutes (12 U.S.C. §§85, 86) condemning usurious charges by national banks to be a matter which ought not be dismissed with such levity. The very statute made the gravamen of the cardholders' claims was recently before this Court in *Marquette National Bank* v. *First of Omaha Corporation*, ... U.S. ....., 58 L.Ed. 2d 534, 541 (1978) and, on that occasion, this Court stated that a national bank is "an instrumentality of the Federal government, created for a public purpose, and as such (is) necessarily subject to the paramount authority of the United States." Consequently, the bank's argument that this litigation has no quasi-public or public overtone and is "purely commercial" is without foundation. The bank's rash characterizations with reference to alleged solicitation and attorneys as real parties in interest are merely "smokescreens" to shift attention from the fact that a national bank, an instrumentality of the Federal government, has been charged with the extraction of interest at a usurious rate in violation of express federal public policy.

The bank makes repeated statements as to the absence of "federal social policy", a lack of "great social reform issues of the day" or "circumstances . . . serv(ing) as a temptation to broaden the traditional concept of a "case or controversy" (Brief of Bank, page 10). These observations are generally applicable to cases of constitutional dimension and are perhaps best met by agreeing

with the bank that the cause of action made the basis of the cardholders' complaint is not grounded upon the violation of a federal constitutional provision. In that respect, the bank's position can then be said to support cardholders' contention that Art. III minima are well satisfied under all of the circumstances of this case because, as has been earlier discussed, additional requirements, not rooted upon considerations of a "case or controversy", may be applicable in order to avoid dismissal where the named plaintiffs' cause of action is grounded upon a violation of a federal constitutional right. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

The bank's disdain for Rule 23 permeates its brief. Judge Medina's allegorical reference to the "green bay tree" as appears on page 12 of the bank's brief is a reference to which the cardholders have been previously treated in earlier stages of this proceeding. The controversy over Rule 23 and the changing role of the federal district judge was directly addressed by Professor Miller in *A. Miller, An Overview of Federal Class Actions; Past, Present and Future* (Federal Judicial Center, 1977) (hereafter "the *Miller Study*"). The *Miller Study* at pages 2 through 12 argues forcefully that many of the changes which opponents of Rule 23 would like to blame upon the 1966 amendment to the rule are in fact changes that would have occurred had Rule 23 not been amended at all. Professor Miller notes:

> "In some respects it (Rule 23) has become a political figure, for example, in the consumer and environmental areas, and some aspects of the rule have received public notoriety in many parts of the United States because of media attention. Unfortunately, much of the discussion has been highly emotional and considerable snake-oil has been sold along the way." *Miller Study*, page 2.

Continuing, Professor Miller makes the further observation which is particularly applicable to the bank's position:

> "That amendment (Rule 23) has become a very convenient scapegoat for those distressed with the character and direction of class action litigation today, particularly those who must defend them . . . but I believe that the federal courts would find themselves in exactly the same position they now are in with regard to class actions had Rule 23 not been touched in 1966." *Miller Study*, page 4.

Professor Miller then points out that while *Brown* v. *Board of Education*, 347 U.S. 483 (1954) had been decided in 1954, the Civil Rights Acts of 1964 and 1965 had not been promulgated at the time the revised rule was drafted and Title 7 did not even exist. Professor Miller considers Rule 23 not to be responsible for the tremendous substantive law changes in the antitrust and securities field facilitating private actions but rather attributes this activity to Supreme Court and Court of Appeals decisions which have recognized new rights in these areas which then lead to class actions. *Miller Study*, p. 7. Only the shift from "opt in" to "opt out" is recognized as having made the representative action a more effective litigation tool for plaintiffs. *Miller Study*, p. 7.

Speaking to a situation comparable to that presented by the statutory action made the basis of the instant case, Professor Miller states that "cases brought under new statutes like Truth in Lending (15 U.S.C. §1601, et seq.) or the Fair Credit Reporting Acts (15 U.S.C. §1681, et seq.) which appear to have been enacted without the class action in mind . . . could have been brought under the 1938 text of Rule 23." *Miller Study*, p. 7. In summary, the study concludes:

> "What has happened is a function of forces set in motion by Congress, the Supreme Court, the Courts of

Appeals, social changes, and the legal profession." *Miller Study*, p. 9.

With this background, we respectfully submit that the bank's dissatisfaction with Rule 23 could more properly be laid at the doorstep of the bank's dissatisfaction with the forces of progress and change which have inevitably accompanied the advent of the latter half of the twentieth century.

A fair assessment of the true import of Rule 23 may well supply the appropriate reference for consideration of the effect of the public interest on the instant case. The wholesome aspects of Federal Rule 23 have been rather succinctly summarized as follows in *Satterwhite* v. *City of Greenville*, 578 F. 2d 987, 998 (5th Cir. 1978):

> "Class actions economize time and effort and prevent a multiplicity of suits, Advisory Committee's Note to Amended Rule 23, 1966, 39 F.R.D. 98, 102; deter mass wrong and fraud, *Parham* v. *Southwestern Bell Tel. Co.*, 8 Cir. 1970, 433 F. 2d 421, 428; preserve the constitutional rights of broad classes of persons, *Jones* v. *Diamond*, 5 Cir. 1975, 519 F. 2d 1090, 1097; provide a forum for the small claimant and the uninformed, *American Pipe & Constr. Co.* v. *Utah, supra*, 414 U.S. at 551-552, 94 S.Ct. at 765; *Samuel* v. *University of Pittsburgh*, 3 Cir. 1976, 538 F. 2d 991, 997; protect the rights of those reluctant to file individual actions against defendants with whom they have continuing necessary relationships, *Haynes* v. *Logan Furniture Mart, Inc.*, 7 Cir. 1974, 503 F. 2d 1161, 1164-1165; *Ste. Marie* v. *Eastern R. R. Ass'n*, S.D.N.Y. 1976, 72 F.R.D. 443, 449; and enhance judicial focus on broader public policy issues abstracted from individual factual idiosyncracies, *Watson* v. *Branch County Bank*, W.D. Mich. 1974, 380 F.Supp. 945, 957; rev'd on other grounds, 6

> Cir. 1975, 516 F. 2d 902. They are an essential part of the judicial arsenal for combatting racial and sexual discrimination. *Johnson* v. *Ga. Highway Express, Inc., supra; Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F. 2d 211, and, for this reason, the courts will respond with flexibility to such claims."

The utility of Rule 23 would be substantially eviscerated by an embrace of the mootness concept urged upon this Court by the bank. It would make possible deliberate evasion of review by capitulation to any individual bold enough to appear as a representative.

As a corollary to the restraints upon the exercise of federal jurisdiction in the form of prudential limitations, policy considerations which go to the heart of operation of a judicial system may compel a refusal to countenance an ouster of jurisdiction in certain instances. As commentators have observed, many class actions are motivated and supported by forces far larger than the immediate interest of the representative plaintiff. Requiring a deliberate search for a new representative would tend to aggravate the occasional unseemly process of recruiting representatives as it now stands. The test should be one of continued effective representation. So long as the named representative continues to satisfy the court that the suit is being pursued with full adversary vigor on behalf of non-mooted class claims, no further requirement should be imposed. See, generally, 13 *Wright, Miller & Cooper, Federal Practice and Procedure*, §3533, p. 291 (1975). As earlier noted, the named plaintiffs here clearly had standing at the outset and were sufficiently motivated to challenge the action of the bank. The desire to see that all receive the relief that has been tendered piecemeal to them well justifies their position on behalf of the absent class member.

The same commentators have also opined:

> "There are ample reasons for concern with class action litigation in which named representatives play no role larger than that of brave volunteers. These concerns however seem awkwardly implemented in the presently announced mootness doctrine." 13 *Wright, Miller & Cooper, Federal Practice and Procedure*, §3533 (1978 pocket part, p. 172).

The argument has been made that the prudential limitation upon exercise of federal jurisdiction, the fact of the particular case being an injury capable of repetition yet evading review, can be adapted to problems arising from deliberate mootness. See 13 *C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure*, §3533, p. 171 (1978 pocket part). Thus, it is there suggested that the court's mootness test related to injury capable of repetition yet evading review could be manipulated to find a continual evasion of review in the possibility or demonstrated fact of deliberate conduct designed to avoid review.

As has been earlier argued in connection with part VII B, when an issue evades review, particularly in a money damage claim not having constitutional overtones, the doctrine of footnote 11 of *Sosna, supra* at 402, easily applies to the bank's mootness contention in the case at bar.

The tactic at bar was rebuffed in *LaSala* v. *American Savings and Loan Association*, 5 Cal. 3d 864, 873, 489 P. 2d 1113, 1118 (1971) as follows:

> "If other borrowers bring a class action, [defendant] may again waive as to those representative borrowers, and again move to dismiss the action. Such a procedure could be followed ad infinitum for each successive

> group of representative plaintiffs. If defendant is permitted to succeed with such revolving door tactics, only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court."

Any other construction would compel piecemeal invasion of intervenors, thereby running counter to the grain of the public policy considerations in favor of avoidance of multiplicity of actions. Of course, the bank has already rejected cardholders' counter offer of judgment which would have expressly preserved the right to class-wide review. It cannot be stated with absolute certainty whether the bank would have paid off any intervenors as they appeared. However, the bank's concerted efforts to avoid class-wide review clearly set the stage for the multiplicity of action the rule seeks to eliminate. We can only assume that the bank was back-stopping its gambit with the prospect of imposition of ethical sanctions on plaintiffs' counsel should the price of the bank's "traditional right to buy peace" suddenly get out of hand. Clearly, the bank's conduct under these circumstances demonstrates the error of emphasis upon the role of intervenors.[4]

Perhaps the most succinct attack on the result urged upon this Court by the bank appears in the dissent of Judge Swygert in *Winokur* v. *Bell Federal Savings and*

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4. The "technical expedient of voluntarily granting the requested relief piecemeal to one named plaintiff after another" has been recognized as a source of obstruction of the rights of a large and genuine class. See *Heumann* v. *Board of Education*, 360 F. Supp. 623, 624 (S.D.N.Y. 1970); *Bledsoe, Mootness and Standing in Class Actions*, 1 Fla. S. Univ. L. Rev. 430 (1973).

Loan Association, on petition for rehearing, 562 F. 2d 1034 (7th Cir. 1977). The dissent states as follows:

> "I am unable to subscribe to a rule which insulates from an appellate review a decision denying class certification solely because a defendant tenders a few dollars to a putative class representative.
>
> * * *
>
> The unfortunate consequences of the rule formulated in this decision on future consumer class actions are plain: Defendants in such actions are now given the arbitrary power to bar appellate review by simply tendering the damages claims to the putative class representative. Rather than to go to trial and face the potential payment of damages which might be assessed in a class suit, defendants will pay off the named plaintiff or plaintiffs, thereby mooting the entire case. I think justice dictates that the right to judicial review should not be denied under the circumstances."

Even the Seventh Circuit has retreated from its holding in *Winokur, supra*, by withholding the availability of the mootness defense in a context when a motion for class certification has been pursued with reasonable diligence and is then pending before the Court. See *Susmann* v. *Lincoln American Corporation*, 587 F. 2d 866 (7th Cir. 1978). But, this result has given the District Court the authority to deny certification, in its discretion, with a certain knowledge that in most cases the docket will soon be cleared of the class action controversy by reason of the likelihood of defendant's tender to the named plaintiffs of individual damage claims. We respectfully submit that the result approved in *Susmann, supra*, continues to pose a potentiality for abuse which is a genuine threat to the future efficacy of Rule 23 actions.

IX.

The Cardholders Have a Personal Interest Stake

The cardholders have repeatedly argued ever since the issue of mootness was first raised by the bank in the Court of Appeals, that they do in fact maintain a personal interest in the controversy by reason of the prospect for the spreading of the expenses generally non-taxable as cost items which have already been incurred and which may well exceed the full amount of the individual claim of each plaintiff. In addition, the provision for the assumption of liability for the expenditure of costs which is mentioned in the opinion below at App. p. 78 continues to give the named plaintiffs a further viable personal interest in the case independent of their status as class champions. It is undisputed that the sums tendered by the named plaintiffs have remained in the district court ever since the date of payment by the bank, thus giving the named plaintiffs an element of adversity that did not even exist in *United Airlines, Inc.* v. *McDonald, supra.*

The bank has commented on the phraseology of the notice of appeal as having been taken on behalf of the named plaintiffs as class representatives but no challenge to the notice of appeal was raised at any time in these proceedings until the bank reached this Court. The bank has continuously been aware of the named plaintiffs' personal stake in the controversy which arises from their role as class champions. The named plaintiffs have lent their names to this cause and we respectfully submit that there is a right to pursue it to a more savory conclusion than a coerced payoff of their individual claims. The personal interest of a named plaintiff arising from the fact that he is a fiduciary was recognized by Chief Judge Seitz in his concurring opinion in *Gardner* v. *Westinghouse Broadcasting Co.*, 559 F. 2d 209, 214 (3rd Cir. 1977), affirmed, ... U.S. ....., 98 S.Ct. 2451 (1978).

X.

The Opinion Below

The bank expresses disapproval of the opinion below to the extent that it suggests a duty upon the named plaintiff who has lost a certification motion to pursue the right to a certification by an appeal. In the instant case, the named plaintiffs took an appeal and whether they did so motivated by belief as to their right to do so or by response to a duty to do so would have no bearing upon the result in the instant case. It can thus be said that the outcome of the instant case is in no-wise affected by the merit or lack of merit of the Fifth Circuit's statements as to the duty of the named plaintiff to prosecute the appeal.

The bank's argument having to do with the alleged absence of prejudice to putative class members challenges the Fifth Circuit's reference to its "special responsibilities" to insure that a dismissal "does not prejudice putative members". Brief of Bank, p. 32. Of course, while the dismissal was without prejudice to the putative members as the bank is at pains to point out, such an argument completely overlooks the barrier of the statute of limitations of two years[5] which, based upon the bank's attitude thus far, can be safely anticipated as a defense to any putative class member's claim.

The bank quibbles with the use of the term "nexus" and is puzzled over a possible explanation. In *County of Los Angeles* v. *Davis*, ... U.S. ....., 59 L.Ed. 2d 642, 649 (1979) this Court equated mootness with the absence of a "legally cognizable interest in the final determination of the underlying questions of fact and law." On this record, either upon the theory that the question would evade review if mootness were recognized or on the concept

5. 12 U.S.C. §86.

that a litigant has a federally protected statutory right to review a final decision adverse to him in a United States District Court or upon recognition of the named plaintiffs' personal interest stake, it can be said that the cardholders have a legally cognizable interest in the final determination of the underlying questions of fact and law. To paraphrase the philosopher Descartes, the bank's position well demonstrates a common fallacy attributed to dialecticians who prescribe certain rigid formulae of argument which lead to a conclusion with such necessity that the form rather than the content of the argument lulls reason into acceptance. Fortunately, the truth often breaks out of this prison of circuitous logic while the proponent remains entangled in the web in which he sought to capture the truth. So it is with the bank.

XI.

Summary of the Courts of Appeals' Treatment of Mootness When No Class Has Been Certified

The issue at bar has been touched on both directly and indirectly in cases presenting the situation of an asserted mootness coupled with a refusal to certify a class or simply a failure to act upon class claims prior to dismissal. In these cases the mootness can arise from either a voluntary act of the defendant, the inevitable result of the passage of time or victory on the merits. Closely related but not totally parallel are cases such as *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Satterwhite* v. *City of Greenville*, 549 F. 2d 347, vacated on rehearing, 557 F. 2d 414, on rehearing en banc, 578 F. 2d 987 (5th Cir. 1978) and *Goodman* v. *Schlesinger*, 584 F. 2d 1325 (4th Cir. 1978) where the named plaintiff was found never to have had standing as a member of the class at the commencement of the action. A sampling of the results from these possible fact patterns is summarized in the ensuing paragraphs.

A. Failure to Act Upon Certification - Mootness Found

1. Failure to Act - Mootness by Voluntary Act

The Second Circuit has found mootness where the action seeking declaratory and injunctive relief was dismissed in the District Court without a ruling on certification after the named plaintiffs had received the relief claimed in their complaint. See, *Boyd* v. *Justices of Special Term, Part I, of the Supreme Court of the State of New York, Bronx County,* 546 F. 2d 526 (2d Cir. 1976). Relation back was withheld on the ground that the action was not so transitory that mootness would inevitably intervene.

The Eighth Circuit has found mootness where the District Court dismissed a class action after a tender of relief and before a hearing on certification. See *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F. 2d 626 (8th Cir. 1975). The deliberate conduct of the defendant was seen as a fact militating against mootness since the issue as to the class continued to evade review. However, substantial changes in the substantive law necessitated broad amendments to the complaint on remand. Thus it could be said that the issue as to the class was so changed that there no longer existed the reality of the claim that otherwise the issue would evade review. *Bradley, supra* at 629.

2. Failure to Act - Mootness by Inevitable Result of the Passage of Time

The Ninth Circuit has found an action moot where the plaintiff had been released from custody prior to certification of a class of persons in custody whom plaintiff sought to represent. See *Vun Cannon* v. *Breed,* 565 F. 2d 1096 (9th Cir. 1977).

3. Failure to Act - Mootness by Victory on the Merits

The Ninth Circuit has found mootness where the plaintiffs obtained an administrative victory on the merits before certification. See *Kuahulu* v. *Employers Insurance of Wausau,* 557 F. 2d 1334 (9th Cir. 1977).

4. Summary

The two cases where mootness prior to certification was based upon a voluntary act are not grounded upon a reading of *Sosna* which would require, as an iron-clad condition precedent, the fact of a class certification as a prerequisite to continued satisfaction of Art. III minima. Both these cases recognized that in certain circumstances a relation back was possible.

The Ninth Circuit's view in *Vun Cannon* v. *Breed, supra,* construes *Sosna,* erroneously we submit, so as to require certification as an absolute prerequisite to appellate review. Interestingly, *Vun Cannon* v. *Breed, supra,* had been dismissed in the District Court for a "lack of standing". Actually, standing had existed at the commencement of the action and the plaintiff's release from custody had brought on mootness. Of course, the District Court's proclamation of a lack of standing was not viewed as an impediment to appellate jurisdiction since standing was a litigated issue in the case. Finally, *Kuahulu* v. *Employers Insurance of Wausau, supra,* interprets *Sosna* in a manner similar to that found in *Vun Cannon* v. *Breed, supra.*

B. Failure to Act Upon Certification - Mootness Not Found

1. Failure to Act - No Mootness by Voluntary Act

The Sixth Circuit refused to find mootness where the named plaintiff prayed for relief for herself and for others

similarly situated and the District Court dismissed the entire action by reason of a tender of relief to the named plaintiff before a certification hearing. See *Weathers* v. *Peters Realty Corporation*, 499 F. 2d 1197 (6th Cir. 1974). The Sixth Circuit reversed a contrary District Court holding stating that mootness of the named plaintiffs' personal claims would not foreclose a representative claim and that any other result would "thwart the purpose" of the litigation. *Weathers, supra* at 1201.

The Seventh Circuit has declined to find mootness under circumstances where the voluntary act occurred prior to the ruling upon a motion for certification regardless of whether the nature of the action is a claim "capable of repetition, yet evading review". See *Susmann* v. *Lincoln American*, 587 F. 2d 866 (7th Cir. 1978). Of course, where the claim is "capable of repetition, yet evading review", mootness will not follow when a voluntary act of the defendant has taken place while certification is pending. *DeBrown* v. *Trainor*, ... F. 2d ..... (7th Cir. April 3, 1979).

2. Failure to Act - No Mootness by Inevitable Result of the Passage of Time

The Second Circuit has refused to find mootness in reliance upon *Sosna, supra* at 402, n. 11, for the conclusion that Art. III minima continued to be satisfied when it could be said that the mootness of the named plaintiffs' individual claim would occur before the District Court could be reasonably expected to rule on the question of certification, thus permitting the doctrine of relation back to apply. See *Jones* v. *Califano*, 576 F. 2d 12 (2d Cir. 1978); *White* v. *Mathews*, 559 F. 2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908.

3. Failure to Act - No Mootness by Victory on the Merits

The Second Circuit has refused to find mootness where the plaintiff received the relief prayed for by administrative action prior to certification. See *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975). The relation back concept of *Sosna* was said to have been clearly applicable and the District Court certification of a class after the administrative action in favor of the named plaintiff was therefore entirely proper.

4. Summary

The Second Circuit cases (*White* v. *Mathews, supra* and *Jones* v. *Califano, supra*, and *Frost* v. *Weinberger, supra*), all justify a determination of the absence of mootness upon the basis that the doctrine of relation back announced in *Sosna* should prevent the mootness of the representative claims. The Seventh Circuit's opinion in *Susmann*, we respectfully submit, is evidence of the first step in a necessary retreat from its opinion in *Winokur* v. *Bell Federal Savings and Loan Association*, 560 F. 2d 271 (7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). *Weathers* v. *Peters Realty Corporation, supra*, proceeds on the more fundamental basis that the named plaintiffs' representative claim was one of the litigated issues in the case and was therefore the proper subject of appellate review.

C. Denial of Certification - Mootness Found

1. Denial - Mootness by a Voluntary Act

The Seventh Circuit has found mootness to exist where the named plaintiff has unsuccessfully sought certification and the defendant has subsequently tendered to the named plaintiff the amount of his individual claim. See *Winokur* v. *Bell Federal Savings & Loan Association*, 560 F. 2d 271

(7th Cir. 1977), on rehearing, 562 F. 2d 1034 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).[6]

2. Denial - Mootness by Inevitable Result of the Passage of Time

The Second Circuit found mootness where all the named inmates in an action commenced as a class action had been released from custody at the time of a hearing on a contempt proceeding brought on by the inmates. See *Lasky* v. *Quinlan,* 558 F. 2d 1133 (2d Cir. 1977).

3. Denial - Mootness by Victory on the Merits

No substantial question exists as to the absence of mootness in the context where certification has been declined and the plaintiff has prevailed on the merits because, even in the view of the dissent in *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978), this Court clearly recognized the right of the named plaintiff to review an adverse class determination after the named plaintiff has pursued the case to judgment. Only *Winokur* v. *Bell Federal Savings & Loan Association, supra,* stands for the proposition that the *Sosna* rationale requires a class certification as a condition precedent to the avoidance of mootness.

The finding of mootness in *Lasky* v. *Quinlan, supra,* is not buttressed by such a rigid interpretation of *Sosna.* In *Lasky* the action had been denied class certification prior to the entry of the order made the subject of the contempt proceedings. In vacating the contempt citation on the ground of mootness, the Second Circuit recognized the *Sosna* endorsement of the applicability of the doctrine of

6. Some bases for denial of certiorari independent of the merits of the questions presented were advanced by the Respondent in *Winokur* and are set forth in the Cardholders' Brief as Opposition to Petitioner for Certiorari, pp. 4-5.

relation back to certification questions but noted that "such an argument is unavailable where, as here, the District Court expressly denied class certification *and there was no appeal from that determination.*" *Lasky* v. *Quinlan, supra* at 1136. Emphasis added. Consequently, *Lasky* appears to recognize the concept of the absence of mootness when the denial of certification is a litigated issue in the case.

D. Denial of Certification - Mootness Not Found

1. Denial - No Mootness by Voluntary Act

The Fifth Circuit's decision in *Roper* v. *Consurve,* 578 F. 2d 1106 (5th Cir. 1978), the case at bar, properly falls under this category.

A decertification occurring after the tender of individual damage claims of the named plaintiffs was reversed by the Ninth Circuit in *Cameron* v. *E. M. Adams & Co.,* 547 F. 2d 473 (9th Cir. 1976). The reversal of decertification was said to relate back to the date of the erroneous order of decertification, thus placing the named plaintiffs in the position they had occupied on that date. A similar result is reached in *Williams* v. *Sinclair,* 529 F. 2d 1383 (9th Cir. 1975), cert. denied, 426 U.S. 936.

2. Denial - No Mootness by Inevitable Result of the Passage of Time

The Third Circuit had declined to find mootness where a federal prisoner challenging parole guidelines served his sentence and was released during the pendency of the action. See *Geraghty* v. *U.S. Parole Commission,* 579 F. 2d 238 (3rd Cir. 1978).

3. Denial - No Mootness by Victory on the Merits

The Tenth Circuit has permitted a relation back of a reversal of the denial of certification after an appeal by

the named plaintiffs after their having prevailed on the merits. *Esplin* v. *Hirschi,* 402 F. 2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969). In *Esplin* the defendant had appealed and the named plaintiffs obtained review of the refusal to certify by cross-appeal. Such result would appear to be mandated by the subsequent case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), reh. denied, 434 U.S. 989 (1978). See also *Gelman* v. *Westinghouse Electric Corporation,* 556 F. 2d 699 (3rd Cir. 1977).

4. Summary

The construction placed upon the *Sosna* line of cases by the Third Circuit in *Geraghty* matches the views advanced herein by the cardholders with respect to the correct interpretation of *Sosna.* In *Geraghty,* the Third Circuit extensively reviewed the *Sosna* line of cases and construed them to require a properly *certifiable* class rather than a class which has in fact been properly certified by the time it reached this Court. *Geraghty, supra* at 249, n. 43.

The recognition of the bifurcated nature of a class plaintiff's claim in his individual capacity as well as in his representative capacity is clearly recognized in *Cameron* v. *E. M. Adams & Co., supra,* where the Ninth Circuit stated that "the post-decertification tender by the defendants to the named plaintiffs cannot satisfy their claims as members of a class." *Cameron, supra* at 478.

E. Conclusion As to Circuit Treatment

Upon a review of the trends in the circuits, the views of the Ninth Circuit as enunciated in *Vun Cannon* v. *Breed, supra,* and the Seventh Circuit as stated in *Winokur* v. *Bell Savings and Loan Association,* appear to be the only two circuits which are presently wedded to a rigid interpretation of *Sosna* so as to require a live controversy

between the named plaintiff and the defendant or a class in fact certified and the defendant at *all* times. Of course, this view disregards the recognition of the availability of the concept of relation back as appears in *Sosna,* 419 U.S. 393, 402, n. 11 (1975). See the discussion of footnote 11 of *Sosna* in *Frost* v. *Weinberger,* 515 F. 2d 57, 64 (2d Cir. 1975), cert. denied, 424 U.S. 958.

Each of the other cases treated in this portion of the brief in which mootness was found to exist contains special facts or circumstances which made application of the doctrine of relation back inappropriate. Finally, the absence of mootness simply because of the right of the named plaintiff in his representative capacity to review the adversely determined representative claim is recognized in *Weathers* v. *Peters Realty Corporation, supra; Lasky* v. *Quinlan, supra;* and *Cameron* v. *E. M. Adams Co., supra.*

CONCLUSION

This Court has heretofore solidly embraced the rule that jurisdiction in the constitutional sense will not be lost simply because the named plaintiffs' claim has become moot. This Court has also recognized the applicability of the doctrine of relation back to orders of certification.

The putative class can supply the requisite adversity to the defendant's position where the class is properly *certifiable,* the class representative has obtained a reversal of an erroneous District Court order refusing certification, and the doctrine of relation back is properly available. Relation back, heretofore applicable to temporal causes of action primarily for injunctive relief, should be available to permit reversal of an erroneous refusal to certify to relate back where otherwise the issue sought to be advanced on behalf of the class will evade review. A con-

trary result would contravene the public policy against proliferation of litigation and would sharply limit the utility of Rule 23.

The cardholders respectfully submit that the judgment of the Court of Appeals is due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Respondents on Vardaman S. Dunn, Esq. and William F. Goodman, Jr., Esq., by depositing same in the United States Mail, postage prepaid and addressed to their respective mailing addresses.

This 6th day of June, 1979.

CHAMP LYONS, JR.
Of Counsel

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

CIVIL ACTION NO. 4261 (N)

ROBERT L. ROPER and JACK HUDGINS, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

CONSURVE, INC., d/b/a BankAmericard Center and DEPOSIT GUARANTY NATIONAL BANK,
Jackson, Mississippi,
Defendants.

COUNTER-OFFER OF JUDGMENT

The plaintiffs, in response to the Offer of Judgment heretofore filed by the defendants on June 1, 1976, do herewith counter-offer to the defendants and for said counter-offer, plaintiffs agree to the entry of a judgment for the amounts claimed as set forth in paragraphs 2 and 3 of the defendants' offer, subject, nonetheless, to the express conditions (1), that plaintiffs do not in any way admit the non-liability of the defendants, (2), that the plaintiffs expressly reserve the right to maintain this action as a class action, and (3) that this counter-offer is made without prejudice to the right of the plaintiffs to seek review of the ruling of this Court on the issue of the maintainability of this action as a class action, upon the

entry of any final judgment based upon defendant's acceptance of this counter-offer.

.....

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CERTIFICATE OF SERVICE

I hereby certify that I have on this ..... day of June, 1976, served a copy of the foregoing Counter-Offer of Judgment on Mr. Vardaman S. Dunn, P. O. Box 1046, Jackson, Mississippi, by hand.

.....

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON, MISSISSIPPI,
Petitioner,

VS.

ROBERT L. ROPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner's basic position remains the same and the salient points in support thereof have been covered in its initial brief. For clarification, we submit the following comments upon some of the arguments advanced in opposition.

I.

No Appeal Was Taken on Behalf of Nominal Plaintiffs and Issue Is Dead Also for This Reason

At page 3, respondent surprisingly states that "The contents of phraseology of the Notice of Appeal were never mentioned by the bank in the Court of Appeals." This simply is not so. The bank filed its "Motion to Dismiss Appeal for Want of Jurisdiction" and assigned four specific grounds as follows: (A. 64-65)

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certification of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The absence of any appeal by the nominal plaintiffs in their own right concludes any debate about the sufficiency and effectiveness of the tender of satisfaction on which the order dismissing the Complaint is based. (A. 60-61)

II.

Wish to Spread Expense and Emotional Involvement Does Not Supply Personal Stake

At page 6, respondent suggests that the personal interest stake is not lost because there is the "prospect of spreading of generally non-taxable expense items". We submit that such a prospect does not supply the personal interest stake. The "spreading" refers to the shifting of expenses to others of the "class" who might fail to opt

out on notice after a certification of the case as a class action. The "prospect" is that the Court might require these solicited parties to share the expense of securing the class certification.

The facts are not in dispute. The defendant has tendered to the named plaintiffs all that they demand, plus legal court costs, which is all that could ever have been recovered against the defendant in the case before the Court.

There is nothing left for the named plaintiffs to recover which can be recognized as an item in litigation. The so-called "generally non-taxable, out-of-pocket expenses" are not recoverable items in litigation.

The extreme importance of rejecting respondent's argument on this point lies with the fact that if "generally non-taxable, out-of-pocket expenses" can supply the required personal stake ingredient of a "case or controversy", *then no class action attempt could ever become moot, because every such attempt will, of necessity, involve some such generally non-taxable, out-of-pocket expenses.*

Of equal concern, and for like reason, is the hypothesis that the self-appointed class champions run the risk of loss of "personal respect and credibility" for having failed to obtain certification. This emotional factor could also be suggested in every case to prevent the case from ever becoming moot.

If either of these concepts is allowed to prevail, mootness will be totally foreign to all cases cast in class action form.

The Fifth Circuit said that if a defendant may "short circuit" a class action by paying off the class representative, and if it were so easy to end class actions, few would

survive. While this view that some way must be found for class actions to survive does not expressly adopt respondents' argument, it is consistent with it.

That class action attempts will, from time to time, perish in this fashion is not to be denied. On the other hand, if the Fifth Circuit's philosophy becomes the law of the land, then *every* class action will survive and live on to a ripe old age.

Is it better that some class actions perish or that all Rule 23(b)(3) class actions survive at any cost? Will the Court adhere to the "personal stake" test for jurisdictional purposes and thereby permit some Rule 23(b)(3) class action attempts to perish, or will the Court embrace the philosophy that whenever a complaint is filed as a class action, a way *must* be found to keep it alive after death of the controversy between the named parties before the Court?

The only subject matter involved here is the recovery of money. Therefore, the personal stake must be a money stake, because there is nothing else involved out of which to construct a case or controversy. Therefore, when the named plaintiff no longer has a personal money stake in the outcome, the case as to him is moot. *Indiana Employment Security Division v. Burney,* 409 U.S. 540, 93 S.Ct. 883 (1973).

To maintain a money stake, the plaintiff's financial interest must be real and direct. In *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669 (1974), the Court, after announcing this rule, applied the jurisdictional truism to class actions, saying:

> ". . . Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); Indiana Employment Division v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed.2d 62 (1973). See 3 B. J. Moore, Federal Practice, ¶23.10-1, n. 8 (2d ed. 1971)." (94 S.Ct. at 676)

There can be no remaining financial interest at stake when the plaintiff has recovered all that he claims or the law allows. There is absolutely no plaintiff before the Court who has not received full satisfaction. To be sure, a "nexus" is required to qualify a class champion to represent the class, but a "nexus" is no substitute for a financial interest stake in a Rule 23(b)(3) action. There is nothing real or "direct" in a residual "nexus", when financial interest is gone.

The concept that a self-styled class representative whose self-appointed status is rejected, may lose "personal respect and credibility" for having received satisfaction is no more than an emotional approach, and this is not enough to meet the case or controversy requirement, as was held in *Ashcroft v. Mattis,* 431 U.S. 171, 97 S.Ct. 1739 (1977):

> ". . . Emotional involvement in a lawsuit is not enough to meet the case or controversy requirement; were the rule otherwise, few cases could ever become moot." (97 S.Ct. at 1740)

When challenged, jurisdiction must rest upon facts alleged and proven and the party asserting jurisdiction has the burden of proof and persuasion. *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178, 56 S.Ct. 780 (1936).

This burden of proving a continuing personal money stake in the case has not been met and the decision of the Court of Appeals can stand only if the "personal stake" test is abandoned in favor of the undefinable "nexus" test as adopted by the Fifth Circuit.

III.

Federal Right of Review Is Always Subject to Article III Challenge

Respondent argues that if the mootness concept is applied here, then the litigant would be deprived of his federal right of review. However, every federal right of review is governed by Article III of the Constitution. No litigant has the right to demand a review unless he can present a live controversy over a personal interest stake to be affected by such a review.

IV.

Alleged Usury Is Not "Capable of Repetition"

Respondent argues that a voluntary cessation of allegedly illegal conduct does not deprive the court of power to hear the case. This argument is coupled with the "capable of repetition, yet evading review" concept.

However, the "capable of repetition" element is obviously missing. The nominal plaintiff has been paid in full. There is no evidence that the nominal plaintiff continues to hold a credit card. In any event, future participation in the credit card program would be purely voluntary. The interest rates have been revised so that there is no possibility that the alleged violation will recur. Mississippi has ratified the charges by making the interest statutes retroactive.

V.

Litigation of Class Issue in District Court Does Not Avoid Mootness

Respondent argues that just because a class action motion is "litigated", it assumes immortality and that it should survive the elimination of the underlying claim of the nominal plaintiff. However, if every issue that is in litigation is to survive only because it has been litigated in some degree, then few cases could ever become moot. Class action attempts are not different and are not unique in relation to survival on or during appeal. As this Court said in *Coopers & Lybrand v. Livesay*, ... U.S. ....., 98 S.Ct. 2454 (1978):

> "There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation. . . ." (98 S.Ct. at 2459)

A jurisdictional standard bearer cannot simply be plucked from a body of unknown and unnamed non-parties, just because a hopeful group of attorneys desire to represent them in a class action on the Court's solicitation.

The mootness question has never been made to turn on whether a procedural issue has been debated at some point in the proceedings.

The class action issue was "litigated" in the cited case of *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (1972), but this Court nevertheless granted certiorari, reversed and remanded with directions to dismiss the case as moot. *Ihrke v. Northern States Power Co.*, 409 U.S.

815, 93 S.Ct. 66 (1972). This action resulted despite the "public interest exception to the mootness doctrine" as adopted in the Eighth Circuit.

VI.

Claim Must Be "Justiciable" in Order to Support Jurisdiction

Respondent argues that mootness must reach all claims in order to be effective. But a "claim" must be a justiciable claim which means at least that it must take form from at least two adversaries who are parties litigant and who have legal standing to present the "claim".

VII.

No Challenged Act of Bank Is Capable of Repetition and No Exception to Mootness Applies

Respondent turns to the concept that a case may be subject to review or the exercise of jurisdiction if a wrongful act is "capable of repetition, yet evading review".

Sometimes loosely called an "exception" to the mootness doctrine, its constitutional justification lies with the underlying likelihood of a repetition of the act in question as against the nominal plaintiff. The prospect of repetition supplies the personal interest stake which keeps the controversy alive as it affects the nominal plaintiff.

Respondent would have the Court eliminate the "capable of repetition" one-half of the exception and sustain jurisdiction only on the basis that the issue could otherwise evade review. To do this, however, is to ignore the only personal interest stake which could link the lawyers' dream to the reality of a live controversy with parties in court.

VIII.

No Prejudice Due to Statutes of Limitations Followed Dismissal

Respondent argues that putative class members will be prejudiced because the statute of limitations will have run against all claims of the class members, citing *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756 (1974) and *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977).

However, *Utah* extends the limitation period for the time that the class action motion was pending and *McDonald* allows for a timely intervention after class action denial for purposes of appeals, thereby, in combination, affording to a potential plaintiff three options. He could have (1) intervened for purposes of appealing the denial of certification, or (2) he could have filed a new action, or (3) he could have done both. Also, of course, he could have stayed out of Court, which he chose, in fact, to do. Having been afforded these options, prejudice is not apparent. There is no evidence that putative class members relied upon this appeal in any respect or that they had any right to do so.

IX.

There Is No Policy or Other Compulsion to Use Rule 23 in the Circumstances of This Case

Respondent's eulogy of Rule 23 is necessarily in the abstract, because no specific benefit may be found in its use in this case except the benefit to be derived by the lawyers seeking to have the Court solicit for them 90,000 claims.

We take no issue with Rule 23 in the abstract, but as applied in this particular case, it has little to commend it, because the only visible beneficiaries are the lawyers and the aggregation of usury claims under its banner violates the articulated public policy of the bank's home state and is viewed by the state's highest Court as a "legal fraud" and, as such, a misuse of the state's interest statutes.

In *Eisen II, Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (CA 2, 1968), Judge Lumbard, dissenting, observed that:

> ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . ." (391 F.2d at 572)

Since Rule 23 is only a procedural device, there should be no judicial compulsion to turn it to questionable purposes or to use it to violate the public policy of the forum state or to minimize the requirements for "case or controversy" jurisdiction.

X.

Right of Review Must Meet the Test of Article III at the Threshold

Respondent cites dictum in two cases, *Coopers & Lybrand v. Livesay*, ... U.S. ....., 98 S.Ct. 2454 (1978), and *United Airlines v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464 (1977), in an attempt to support the argument that a self-appointed class champion may obtain a review of a negative class action order without maintaining a personal interest stake in the underlying claim for a money recovery.

The asserted conclusion is not supported by the cited cases.

In *Coopers & Lybrand v. Livesay*, supra, the Court dealt with the question of whether an order denying a class action certification should be subject to interlocutory appeal or appeal under the collateral source doctrine.

In the process of holding that an order denying class action status was not subject to interlocutory appeal, the Court said:

> ". . . Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. United Air Lines v. McDonald, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. . . ." (98 S.Ct. at 2458)

Respondent reads this language of the Court and similar language in *United Airlines v. McDonald*, supra, as immunizing class action attempts from the force and effect of Article III of the Constitution and the application of the mootness doctrine.

On the other hand, this Court did not speak to these jurisdictional questions in either of the cited cases and there is nothing in the cited cases to suggest that the Court intends to immunize class actions from the "case or controversy" mandate of the Constitution. Respondent's reading of the cases confuses the right to a statutory appeal with the right of the appellate court to exercise jurisdiction.

This Court was careful to emphasize in *Livesay*, supra, that the class action rules do not contain any unique provisions governing appeals and that appeals in such cases are determined by the same standards that govern appealability in other types of litigation. (98 S.Ct. at 2459)

The "class action" format changes nothing. As emphasized by the Court in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976):

"The individual respondents sought to maintain this suit as a class action on behalf of all persons similarly situated. That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' Warth v. Seldin, 422 U.S. at 502, 95 S.Ct. at 2207, 45 L.Ed.2d, at 357." (96 S.Ct. at 1925, footnote No. 20)

A right of review is indeed triggered by every final judgment under the provisions of 28 U.S.C., §1291, but standing at the threshold of every statutory appeal and review is the question of the appellate court's jurisdiction to proceed and this is so whether the appeal is one which is interlocutory or one which is taken as of right from a final judgment.

This Court has never suggested that a procedural issue could be used to keep the underlying controversy alive when, on appeal, it appears that there is no appellant before the Court who continues to maintain a personal interest stake in the underlying substantive claim. While the appeal may be duly perfected under 28 U.S.C., §1291, the record does not reach the appellate level free from the threshold question of jurisdiction or with any immunity from the force of Article III or the sweep of the mootness doctrine.

The vital threshold character of this question in every federal case at every level of consideration was emphasized in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197 (1975):

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. . ."

In *Warth v. Seldin,* supra, the Court re-emphasized the point that in a "class action" case, the nominal plaintiffs could not meet the "case or controversy" requirement on appeal or elsewhere in the federal system by resting their claims upon the rights or interests of third parties, concluding:

". . . The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action. . . .' Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). See Data Processing Service v. Camp, 397 U.S. 150, 151-154, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970)."

Also:

". . . Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. E.g., Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943). See United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); . . . ." (95 S.Ct. at 2205)

Also:

> ". . . Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless the petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.' O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). See, e. g., Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 559-561, 7 L.Ed.2d 512 (1962)." (95 S.Ct. at 2207)

These same standards, applied on appeal, require dismissal of the instant case for mootness.

We return to the factual situation of the present case. Here there was no trial on the merits but instead, there was a dismissal based upon a tender of the total amount demanded by the nominal plaintiffs after class action status had been rejected by the District Court. In this situation, appealability, in its jurisdictional sense, continues to depend upon whether the nominal appellant retains a personal financial stake in the outcome of the case judged by the same standards that govern appealability and review in all other cases.

Applying these "same standards", the nominal plaintiff in the instant case no longer has the necessary personal stake. The lawsuit is headless. All that remains is the desire of a group of lawyers to represent the faceless and unknown members of an unnamed potential class who have manifested no interest whatever in engaging their services and who in nowise appear as parties in court. The case is moot by all standards.

CONCLUSION

This Court has consistently held that when a class champion loses his personal interest stake in the outcome of the underlying claim for relief, the courts no longer retain jurisdiction and that this applies to all courts, at all levels of the federal judicial system.

This Court has never indicated an intention to abandon this jurisdictional concept based, as it is, on Article III of the Constitution. We submit that it should not be abandoned now.

Respectfully submitted,

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